Supreme Court, U.S.
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In The

Supreme Court of the United States

SAUL GREGORIO MARTINEZ,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On a question that has divided the circuit courts, whether a false statement that does not go to the heart of an alien's operative asylum application, made before the effective date of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005), automatically disqualifies an asylum applicant from relief.

2. On a question that has divided the circuit courts, whether an adverse credibility determination, made with regard to an alien's asylum application, automatically disposes of an alien's separate claim under the Convention Against Torture, 8 C.F.R. § 208.16(c)(2).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) ("*Martinez*"). A copy of this opinion is included at Appendix 1-17. The pertinent underlying decision of the Board of Immigration Appeals ("BIA") is included at Appendix 18-21. The United States Court of Appeals for the Ninth Circuit denied rehearing and *en banc* review on September 8, 2009. A copy of this order is included at Appendix 22.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254.

REGULATORY PROVISION INVOLVED

> The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. § 208.16(c)(2).

STATEMENT OF THE CASE

Petitioner Saul Gregorio Martinez ("Martinez") is a 45-year-old gay man from Guatemala. Because of his sexual orientation: (1) the Guatemalan police physically assaulted him on two occasions and sexually harassed him on one occasion; (2) a Guatemalan Congressman raped him; and (3) the wife of that Congressman hired henchmen to locate, detain and beat Martinez. Martinez fears for his life and safety if he returns to Guatemala because both the Congressman and the Congressman's wife have threatened to harm him again. There is no dispute in the record about these facts.

Martinez fled Guatemala and arrived in the United States on May 14, 1992. With the assistance of a "notario," he filed an application for asylum and withholding on September 21, 1992.[1] Martinez's original asylum application inaccurately stated that Martinez had been the victim of persecution because of his political beliefs. The application did not contain information about the persecution that Martinez experienced on account of his sexual orientation. Martinez's original application was prepared to fit within the then current guidelines for permitting asylum.

Persecution based on sexual orientation was not a valid basis for requesting asylum in 1992, when

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[1] A "notario" is an individual who assists immigrants with legal services related to immigration matters, but is not licensed to practice law.

Martinez first submitted his application. *See Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005). On April 4, 1996, the Immigration and Naturalization Service ("I.N.S.") changed its position to recognize persecution based on sexual orientation as a valid ground for asylum. *See* App. 15 (Pregerson, J., dissenting). Nineteen days later, on April 23, 1996, Martinez filed a detailed declaration explaining his true reasons for seeking asylum. *See* App. 15-16 (Pregerson, J., dissenting).

When Martinez appeared before an Immigration Judge ("IJ") at his first merits hearing, he immediately withdrew his original application for asylum, explained that the original application was inaccurate, and submitted his new declaration recounting the abuses that arose from the persecution he suffered because of his sexual orientation. Martinez explained that he was afraid to reveal his sexual orientation in his original asylum application because he feared he would be deported to Guatemala and would be harmed. To substantiate Martinez's previous fear of disclosing his sexual orientation and his modified claim for asylum, Martinez, his life partner, his present employer, and two experts (who provided evidence regarding the level of persecution against gay men in Guatemala) testified on his behalf. In addition, Martinez submitted approximately 200 pages of country condition reports detailing the persecution of homosexuals in Guatemala.

The IJ denied Martinez's claim, finding his testimony not credible on the sole ground that Martinez's

initial asylum application was false and failed to disclose his sexual orientation. The IJ did not mention a single discrepancy, inconsistency or implausibility with respect to Martinez's testimony about his operative asylum claim based on sexual orientation. On April 30, 2002, the BIA adopted and affirmed the IJ's adverse credibility determination.

On July 25, 2003, the Ninth Circuit granted a petition for review filed by Martinez. *See Martinez v. I.N.S.*, 72 Fed. Appx. 564, 2003 WL 21750801 (9th Cir. July 25, 2003) (asserting jurisdiction under 8 U.S.C. § 1105a (repealed 1996)). The Ninth Circuit held that Martinez's explanation for fearing to disclose his sexual orientation was not a material misrepresentation because it was "wholly consistent" with the second asylum application that was presented before the IJ. *Id.* at *1. In particular, the Ninth Circuit observed that Martinez presented a reasonable explanation when he testified that "the misrepresentation was due to a fear of facing further persecution if the government learned of his sexual orientation." *Id.* The Ninth Circuit therefore remanded the matter back to the BIA because the BIA's credibility finding was not "legitimate, let alone cogent." *Id.*

Following the Ninth Circuit's decision, Martinez filed a timely motion alleging that he should be granted asylum and withholding from deportation because of his fear of facing further persecution based on his sexual orientation. In the same motion, Martinez asserted that he had established a *prima facie* claim pursuant to the Convention Against

Torture ("CAT"), 8 C.F.R. § 208.16(c)(2), because it was more likely than not he would be tortured if he returned to Guatemala.[2] The Government did not oppose Martinez's motion.

On May 19, 2004, the BIA denied Martinez's claims for asylum and withholding, finding that Martinez's failure to disclose his sexual orientation in his initial application in 1992 was material. App. 19. The BIA also denied Martinez's CAT claim because Martinez purportedly "failed to establish that it is more likely than not that he will be tortured by government officials if he returned to Guatemala." App. 21. The BIA did not provide any explanation for the latter finding. *Id.*

On March 3, 2009, in the decision at issue, the Ninth Circuit denied Martinez's petition for review of the BIA's decision, his claims for asylum and withholding of removal, and his motion to reopen to consider his CAT claim. App. 1-14. The Ninth Circuit's decision states that Martinez lied under oath, and that his lies were "material and went to the

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[2] Martinez was not able to present a CAT claim earlier because the remedy was not available until 1999, which was three years after his hearing before the IJ. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8482-8483 (February 19, 1999) (codified at 8 C.F.R. §§ 208.16-208.18 (1999)); *see also* 8 C.F.R. § 208.16(c)(1) ("Convention Against Torture" refers to the United Nations Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, as implemented, with provisos, by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, 112 Stat. 2681, 2681-821).

heart" of his asylum claim. App. 13. The lies referenced by the majority relate only to those made by Martinez in his original asylum application, *see* App. 12-13, which was not the operative application under consideration by the time Martinez appeared for his first merits hearing before the IJ, *see* App. 15-17 (Pregerson, J., dissenting). There is no evidence in the record that Martinez ever lied about being persecuted based on his sexual orientation, which served as the basis for the modified, operative asylum application that was presented to the IJ.

Judge Harry Pregerson filed a dissenting opinion in *Martinez*. App. 14-17 (Pregerson, J., dissenting). Judge Pregerson's dissent observed that, taken in context, there was a rational explanation for Martinez's modification to his application:

> [i]f Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported. . . . Martinez misrepresented the truth solely to avoid persecution in Guatemala based on his sexual orientation, in response to U.S. immigration policies forbidding such asylum claims at the time he made the statements.

App. 15-16 (Pregerson, J., dissenting). "In this context," Judge Pregerson explained, "it is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation." App. 15 (Pregerson, J., dissenting).

On April 16, 2009, Martinez petitioned the Ninth Circuit for rehearing. On September 8, 2009, the Ninth Circuit denied Martinez's Petition for Rehearing and Petition for Rehearing *En Banc*. App. 22.[3]

REASONS FOR GRANTING PETITION

THIS COURT SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS AND DECIDE A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER, IN IMMIGRATION CASES COMMENCED BEFORE THE EFFECTIVE DATE OF THE REAL ID ACT OF 2005, FALSE STATEMENTS MADE IN THE COURSE OF SEEKING ASYLUM MAY AUTOMATICALLY BAR APPLICANTS FROM RELIEF OR WHETHER FALSE STATEMENTS MUST BE CONSIDERED IN THE CONTEXT OF AN ALIEN'S OPERATIVE ASYLUM APPLICATION.

There Is A Split Among The Circuits As To Whether And When, In Pre-REAL ID Act Cases, A False Statement Made In The Course Of Seeking Asylum Should Bar Relief.

The Ninth Circuit's decision in *Martinez* creates a *per se* rule that, in a case commenced before the

[3] Martinez applied to the Ninth Circuit and then to Associate Justice Anthony M. Kennedy for a stay of the Ninth Circuit's mandate. The applications were denied on October 27 and 30, 2009, respectively.

effective date of the REAL ID Act of 2005, a false statement made in the course of seeking asylum may bar relief whether or not the false statement actually goes to the heart of the applicant's operative asylum application. The Ninth Circuit's decision in *Martinez* is supported by decisions from the First Circuit, but stands in conflict with decisions from the Second, Third, Sixth, Seventh and Tenth Circuits, which hold that false statements must be evaluated in the context of the application then under consideration.

For asylum cases commenced after May 11, 2005, an IJ may rely on *any* inconsistency or omission in making an adverse credibility determination "*without regard* to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). *See also* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005) (the "REAL ID Act").

For ***pre***-REAL ID Act cases – *i.e.*, cases, such as the one at bar, originally filed before the REAL ID Act's effective date – most circuit courts around the country consistently hold that a false statement made in the course of seeking asylum may not, *per se*, bar an applicant from relief. For example, in the pre-REAL ID Act case of *Guo v. Ashcroft*, 386 F.3d 556, 562-563 (3d Cir. 2004), the Third Circuit held that the mere fact that an immigration judge had previously rejected, as not credible, a Chinese national's claims of persecution in her homeland as a result of her religious beliefs did not provide sufficient basis for

denying, based on a prior adverse credibility finding, the alien's motion to reopen removal proceedings to present evidence that, because she became pregnant with a second child while present in the United States, she had a well-founded fear of forced abortion or forced sterilization if returned to Mainland China based on China's one-child policy because the prior credibility finding was made in a completely different context, on an unrelated religious-based claim for asylum. The *Guo* court held that an adverse credibility finding in one asylum application does not "beget another," and "an IJ must justify each adverse credibility finding with statements or record evidence specifically related to the issue under consideration." *Id.* at 562; *see also id.* ("[t]he legitimacy of an initial credibility determination does not . . . justify denial of all subsequent applications for asylum").

Like the Third Circuit in *Guo*, the Second, Sixth, Seventh and Tenth Circuits have rejected, under similar facts, a *per se* adverse credibility rule in pre-REAL ID Act cases, insisting instead that immigration judges evaluate falsities and discrepancies in context and only find false statements to be material if they actually and specifically go to the heart of the application under consideration.[4]

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[4] *See Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 167 (2d Cir. 2006) (remanding an asylum claim because the IJ "did not evaluate [the applicant's] explanation that she feared being jailed in the United States" as the reason why she did not reveal her actual asylum claim to an immigration officer); *Diallo v. Gonzales*, 445 F.3d 624, 629 (2d Cir. 2006) ("a petition for review

(Continued on following page)

Martinez is a pre-REAL ID Act case. *See* App. 3. The *Martinez* court held that Martinez's misrepresentations were material and went to the heart of his claim for asylum, App. 13, but they did not relate at all to the operative claim for asylum that he presented at his first merits hearing before the IJ, *see* App. 15-17 (Pregerson, J., dissenting). Martinez's misrepresentations went only to the asserted basis for his initial, superseded asylum application filed back in 1992. Martinez's prior false statements about persecution based on political opinion were not material to his request for asylum for an entirely different reason – fear of persecution because of his

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may be granted in the face of an adverse credibility decision by the IJ when she fails to engage or evaluate an asylum applicant's explanations for apparent inconsistencies in the record") (internal quotation marks omitted); *Uanreroro v. Gonzales*, 443 F.3d 1197 (10th Cir. 2006) (alien fleeing persecution who lied to an immigration inspector by stating that the passport she carried was hers and that she had lived in London for the previous six months, did not constitute sufficient evidence to support adverse credibility determination in asylum proceeding); *N'Diom v. Gonzales*, 442 F.3d 494, 499 (6th Cir. 2006) (remanding case because "[n]either the Immigration Judge nor the Board explains why they disbelieve [the applicant's] explanation for" discrepancies between his written application and testimony); *Shtaro v. Gonzales*, 435 F.3d 711, 716 (7th Cir. 2006) ("[A]dverse credibility determinations may not be based on minor discrepancies that are easily explained . . . and the IJ did not attempt to ascertain whether these omissions could be accounted for"); *Mece v. Gonzales*, 415 F.3d 562, 575-76 (6th Cir. 2005) (adverse credibility findings in pre-REAL ID case must "'go to the heart'" of the applicant's asylum claim and cannot be based on "'irrelevant inconsistencies'").

sexual orientation. The IJ, BIA and majority in *Martinez* thus adopted a *per se* rule that Martinez's original lies, based on a previous, and later renounced, iteration of his asylum application, warranted an adverse credibility determination with regard to a modified asylum application rooted in different circumstances, the factual basis for which was never called into doubt with any contrary evidence.

The Ninth Circuit's decision in *Martinez* is in line with decisions from the First Circuit. For example, in *Toure v. Ashcroft*, 400 F.3d 44, 47-48 (1st Cir. 2005), the First Circuit affirmed an immigration judge's adverse credibility determination, which relied on inconsistent testimony that an applicant provided in her husband's removal proceedings before a different immigration judge. *See also Yongo v. I.N.S.*, 355 F.3d 27, 33-34 (1st Cir. 2004) (holding that false information in an alien's prior asylum application in Germany was "arguably pertinent to [the alien's] ability to qualify for asylum under United States law"). *Martinez* and the decisions from the First Circuit conflict with precedent from the Second, Third, Sixth, Seventh and Tenth Circuits that requires a fact-finder in pre-REAL ID Act cases to analyze the bases and context for discrepancies before categorically finding that a lie defeats an asylum claim.

In addition to the split *among* the circuits described above, there is also widespread confusion *within* circuits as to whether false testimony in a pre-REAL ID Act asylum application can give rise to a *per*

se adverse credibility determination. For example, the Second Circuit does not have a consistent body of law when it comes to adverse credibility determinations in pre-REAL ID Act cases. *Compare Ucelo-Gomez v. Gonzales*, 464 F.3d at 167 and *Diallo v. Gonzales*, 445 F.3d at 629 *with Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (holding that inconsistent testimony in pre-REAL ID Act cases may support an adverse credibility determination even where it does not go to the heart of an applicant's claim). And, notwithstanding the decision in *Martinez*, the Ninth Circuit also has rejected a *per se* rule in pre-REAL ID Act cases. *See Jibril v. Gonzales*, 423 F.3d 1129, 1134 (9th Cir. 2005); *Turcios v. I.N.S.*, 821 F.2d 1396, 1400 (9th Cir. 1987). Although this Court typically does not resolve splits within circuits, where, as here, intra-circuit conflicts relate to a recurring and important issue or are accompanied by conflicts among the circuits, certiorari is warranted. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 467 (1967); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948) (certiorari granted because of differing views within a circuit that was most frequently confronted with difficult bankruptcy problems).

The Third Circuit's decision in *Guo*, Judge Pregerson's dissent in *Martinez*, the Ninth Circuit's decisions in *Jibril* and *Turcios* and the similar decisions of the Second, Sixth, Seventh and Tenth Circuits came to the proper conclusion: a misrepresentation is material only if it goes to the heart of the asylum application that is operative and under

consideration. If this case were decided in, for example, the Third Circuit, that court, consistent with its holding in *Guo*, would have held that Martinez's false statements on his initial asylum application were not material to, and did not go to the heart of, his modified, operative asylum application, which was based on his fear of persecution because of his sexual orientation.

The Split Affects Thousands Of Applicants For Asylum In Courts Throughout The United States.

The United States Circuit Courts of Appeals hear approximately 10,000 appeals from the BIA each year.[5] The Ninth Circuit hears nearly half of those appeals. *Id.* The Ninth and Second Circuits, combined, hear a majority of the 10,000 annual appeals from the BIA. *Id.* Over the past several years, approximately thirty-five to forty percent of the Second and Ninth Circuits' dockets have concerned immigration cases. *Id.* "A substantial percentage of these immigration cases concerns asylum, and credibility determinations are the most challenged aspect of asylum claims." Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Texas Int'l L. J. 185, 187 (Winter 2008) (hereinafter "Rempell") (citation omitted).

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[5] *See* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

The exact number of pre-REAL ID Act cases involving adverse credibility determinations is not available, but there are likely thousands of such cases still working their way through the lower courts. One commentator, who wrote favorably of the REAL ID Act last year, acknowledges that the volume of pre-REAL ID Act cases is likely high as the REAL ID Act is only beginning to impact the circuit courts:

> [T]he impact of the REAL ID Act amendments to the INA is only beginning to be felt, as asylees' applications make their way from the U.S. Citizenship and Immigration Services asylum offices, if applicable, to the immigration judges initially adjudicating the cases, to the Board of Immigration Appeals ("Board" or "BIA"), and then to the United States Court of Appeals sitting within the applicable venue.

Rempell, *supra*, p. 13 at 188 (footnotes omitted).

This Court should guide asylum officers, immigration judges, the BIA and circuit courts by resolving a conflict in the law impacting thousands of people whose immigration cases commenced before May 11, 2005.

THIS COURT ALSO SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER AN ADVERSE CREDIBILITY DETERMINATION MADE WITH REGARD TO AN ASYLUM APPLICATION AUTOMATICALLY DISPOSES OF A SEPARATE CLAIM UNDER THE CONVENTION AGAINST TORTURE.

The Circuit Courts Are Divided As To Whether An Adverse Credibility Determination Regarding An Alien's Asylum Claim Automatically Disposes Of A Separate Claim Under The Convention Against Torture.

The Ninth Circuit concluded in *Martinez* that an adverse credibility decision in connection with Martinez's asylum claim automatically disposed of Martinez's claim under the Convention Against Torture ("CAT"), 8 C.F.R. § 208.16(c)(2). The Eighth Circuit would agree with the Ninth Circuit's decision, but the Second, Third, Sixth and Seventh Circuits would not.

Martinez presented extensive evidence to the BIA that established a *prima facie* claim under CAT that it was more likely than not that he would be tortured if returned to Guatemala.[6] Besides his own testimony

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[6] *See* 8 C.F.R. § 208.16(c)(2) (removal must be withheld under CAT if the petitioner establishes that it is more likely than not that he would be tortured if removed to the proposed country of removal).

detailing the rape, physical attacks, and threats he suffered at the hands of a Guatemalan congressman, police officers, and others, Martinez also offered the testimony of two experts regarding the extreme dangers he faced if he returned to Guatemala. Martinez also provided extensive documentary evidence, including 200 pages of country condition reports demonstrating the risk of torture he would face if returned to Guatemala.

There is no evidence in the record contrary to Martinez's evidence in support of his CAT claim. Moreover, the Government did not contest the evidence when it was first presented to the BIA. Nonetheless, the BIA held that Martinez had not made a *prima facie* case under CAT. App. 21. The BIA provided no reason for its holding other than the *ipse dixit* statement that "the respondent failed to establish that it is more likely than not that he will be tortured by government officials if returned to Guatemala." *Id.* The Ninth Circuit's decision affirming the BIA's holding consisted of nothing but a single-sentence footnote that the "BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case" under CAT. *Martinez*, App. 14 n.1. Neither the BIA nor the Ninth Circuit acknowledged, let alone addressed, the extensive testimonial, expert, and documentary evidence Martinez provided in support of his CAT claim.

The BIA's and the Ninth Circuit's failure to articulate any independent basis for rejecting the CAT claim strongly indicates that they believed

that the adverse credibility determination against Martinez with regard to his asylum claim automatically disposed of his CAT claim as well. In so doing, the BIA and the Ninth Circuit effectively combined the adjudication of Martinez's asylum claim and his CAT claim into one single inquiry, with the two claims rising and falling together based on the adverse credibility determination made explicitly with regard to his asylum claim.

The Ninth Circuit's conclusion that the BIA's adverse credibility determination as to Martinez's asylum claim must mechanically dispose of his CAT claim conflicts with the law of other circuits. For example, in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184-186 (2d Cir. 2004), the Second Circuit vacated dismissal of a petitioner's CAT claim because the BIA had failed to analyze the CAT claim separately from his asylum claim, which had been rejected based on an adverse credibility determination. The court explained that the BIA had erred in rejecting the CAT claim "by placing determinative weight on the adverse credibility determination" it had made regarding the asylum claim. *Id.* at 184. The court added:

> More fundamentally, both the IJ and BIA incorrectly assumed that Ramsameachire's CAT claim was necessarily precluded because he had failed to carry his burden of proof with respect to his asylum claim. Because the CAT inquiry is independent of the asylum analysis, however, the BIA's decision with respect to an alien's claims for

> asylum and withholding of removal pursuant to the INA should never, in itself, be determinative of the alien's CAT claim.

Id. at 184-185.

The Second Circuit also recognized that combining the adjudication of asylum and CAT claims into one single determination does not just result in a technical procedural error, but can lead to substantively incorrect decisions regarding CAT claims. *See id.* at 185-186. This is because an adverse credibility determination may "doom an alien's asylum claim, but may not be a particularly significant aspect of the CAT inquiry," as the CAT inquiry focuses on matters other than just a petitioner's testimony such as expert testimony and documentary evidence including country reports. *Id.* at 185. Such is the case with Martinez, who offered significant and uncontested expert and documentary evidence demonstrating the likelihood that he would be tortured if he were returned to Guatemala. Moreover, there is no clear nexus between the determination of whether Martinez would face torture in Guatemala, which is the proper inquiry on his CAT claim, and the IJ's and BIA's belief that Martinez's credibility was damaged by his failure to disclose his sexual orientation in his initial asylum application, which was the BIA's and the Ninth Circuit's stated grounds for denying his asylum claim.

The Third, Sixth, and Seventh Circuits have issued decisions consistent with the Second Circuit's

decision in *Ramsameachire* and inconsistent with the Ninth Circuit's decision in *Martinez*. *See Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003); *Mansour v. I.N.S.*, 230 F.3d 902, 908 (7th Cir. 2000); *Ndiaye v. Gonzales*, 184 Fed. Appx. 458, 463 (6th Cir. 2006). On the other hand, the Eighth Circuit has issued decisions consistent with *Martinez's* holding that an adverse credibility determination made in connection with a petitioner's asylum claim automatically disposes of his CAT claim as well. *See Desna v. Gonzales*, 454 F.3d 896, 899 (8th Cir. 2006); *Cooke v. Mukasey*, 538 F.3d 899, 908 (8th Cir. 2008); *Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005).

In addition to the division among the circuits, there is a lack of uniformity *within* the Ninth Circuit. In contrast to the holding in *Martinez*, the Ninth Circuit in *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1283 (9th Cir. 2001), vacated the denial of a CAT claim because the BIA "failed to recognize the central distinction that claims for relief under the Convention are analytically separate from claims for asylum" and "plainly overrelied on its prior adverse credibility finding against [petitioner] and failed to consider evidence of the relevant country conditions in the record" that were relevant to the CAT claim.

If Martinez's case were decided in the Second, Third, Sixth or Seventh Circuits – or under the Ninth Circuit's decision in *Kamalthus* – the result would have been different. Those courts would not have rejected his CAT claim because of an adverse credibility determination made as part of his asylum

claim. Instead, Martinez's CAT motion, which was not opposed by the Government, would have been evaluated separately, on its own merits. Based on the record in this action, those courts would have concluded properly that Martinez made a *prima facie* showing that it was more likely than not he would be tortured if he returned to Guatemala.

The Conflict In The Courts Below Raises An Important Question Of Federal Law Impacting An Increasing Number Of Claimants Under The Convention Against Torture.

There is a profound nationwide division of opinion on the proper relationship between adverse credibility determinations and CAT, which potentially impacts every alien applying for both asylum and protection under CAT. Adverse credibility determinations were made before and after passage of the REAL ID Act, but the REAL ID Act now gives judges nationwide the expanded authority to make adverse credibility determinations "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158(b)(1)(B)(iii). This expanded authority to make adverse credibility determinations heightens the need for this Court to give guidance as to the proper relationship, if any, between adverse credibility determinations in asylum cases and CAT cases because it is likely that the number of adverse credibility determinations will increase nationwide.

Moreover, because of the expanded discretion afforded judges under the REAL ID Act, asylum claims likely will be denied more often, which makes it all the more important not to have asylum credibility determinations automatically dispose of CAT claims.

CONCLUSION

Saul Gregorio Martinez respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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557 F.3d 1059

United States Court of Appeals,
Ninth Circuit.
Saul Gregorio MARTINEZ, Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General, Respondent.
No. 04-72975.

Argued and Submitted Dec. 7, 2007.
Filed March 3, 2009.

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Arthur L. Rabin, U.S. Department of Justice, Office of Immigration Litigation, Washington, D.C., for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A70-217-803.

Before: HARRY PREGERSON, JOHN T. NOONAN, and STEPHEN S. TROTT, Circuit Judges.

Opinion by Judge TROTT; Dissent by Judge PREGERSON.

TROTT, Circuit Judge:

Saul Martinez, a native of Guatemala, petitions for review of a Board of Immigration Appeals' ("BIA") decision that denied his claims for asylum, withholding of removal, and voluntary departure. In a 2003 decision, this court remanded the matter to the BIA for further proceedings, concluding that it had failed to provide cogent reasons for rejecting

Martinez's testimony in support of his application. *Martinez v. I.N.S.*, 72 F. App'x 564 (9th Cir.2003). In its recent decision, the BIA upheld the Immigration Judge's ("IJ") adverse credibility finding regarding Martinez. Martinez also petitions for review of the BIA's decision that denied his motion to reopen to consider his Convention Against Torture claim.

We have jurisdiction over this timely petition, which we deny on both counts.

I

"We review adverse credibility findings under the substantial evidence standard." *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir.2007). "The BIA must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief." *Valderrama v. I.N.S.*, 260 F.3d 1083, 1085 (9th Cir.2001) (internal quotation marks omitted). Here, because the BIA failed when it first heard this case to provide specific, cogent reasons to support its initial adverse credibility determination, we remanded to give the BIA the opportunity to provide reasons for its conclusions. *See Garrovillas v. I.N.S.*, 156 F.3d 1010, 1015-16 (9th Cir.1998) (finding that the BIA's decision was not supported by substantial evidence and remanding to the BIA with instructions to provide specific reasons). The BIA has followed our instructions, and we now review its decision.

II

The facts pertaining to Martinez's credibility – or the lack thereof – are striking. In his initial Request for Asylum in the United States dated September 21, 1992, he made the following admittedly false representations under penalty of perjury, declaring that "the above and all accompanying documents are true and correct to the best of my knowledge and belief":

> I am seeking Asylum in the US. Because in Guatemala I was threatened by the Gobernment because I was in the University of San Carlos I was Leader of the Students in the University of San Carlos and for this reason the Gobernment persecuted and threatened me, I am afraid to return Guatemala because many of my companions to disappear completely and I can to disappear likewise. I was constantly threatened by the Gobernment and my life was in more danger than the rest of the people of my country. If I didn't leave, I would have been killed.
>
> The constant conflicts that exist in Guatemala no security for anyone. In my case that I belonged to student groups is very hard to live in Guatemala.
>
> . . . .
>
> I was in Student Group of The University of San Carlos during the period between 1986 to Nov. 1991. I was active member. My duties were to organized Political Meeting. And organized to the Students.

. . . .

> I was threatened by the Gobernment they have gone on various occasions to my house and the University looking for me. because I was Leader of the Students in the University of San Carlos, causing my life to be threatened to death by the Gobernment.

. . . .

> I came to the US. in search of protection of my life, I also came in search of a peaceful life without always having to fear for my life, because in Guatemala my life was in danger, I was always persecuted by the Gobernment.

The next step in what turns out to have been a plot to deceive the Immigration and Naturalization Service, the United States Department of Justice, and the Attorney General was to foil the asylum officer assigned to his case. To accomplish this ruse, he appeared in person before the officer three years after his application and testified under oath – again falsely – that he was the victim of persecution "on account of my political opinion." Moreover, he swore before the officer that the content of his initial request was true. The officer's Assessment Report dated November 14, 1995, demonstrates that his hoax was designed to fit neatly into the requirements of our asylum law. The officer's report reads as follows:

> Applicant indicated that he is a 31-year-old male native and citizen of Guatemala who entered the United States on May 14, 1992 at San Ysidro, Ca without inspection.

Applicant fears that he will be killed by the government on account of his *political opinion.*

Applicant credibly testified that in January 1991, he became a leader in a student club at San Carlos University. Applicant stated that he began having problems due to his political opinion after participating in Mardi Gras type parades with political overtones. Applicant began receiving threatening phone calls in January 1991 and believed that agents of the government were responsible. Applicant did not stated [sic] a political opinion in response to the phone calls. Applicant stated that the calls persisted through June 1991, when Applicant went to visit his parents in Puerto Barrios. Applicant did not expereince [sic] any problems in Puerto Barrios and stated that it was a remote little town far from Guatemala City. In August 1991, Applicant was chased by a car. Applicant was not harmed, although he believed that the government was responsible. In November 1991, Applicant was again chased by a car and shot at. Applicant was not harmed and believed that the government was trying to scare him. Applicant left Guatemala the next day and traveled through Mexico prior to coming to the United States. Applicant further stated that he has a brother, who is currently living in Guatemala City and not experiencing any problems with the Government. Applicant's family is presently living in Puerto Barrios,

> and not experiencing problems with the government.
>
> Applicant has been threatened on several occasions on account of his political opinion. Threats alone do not constitute persecution. The Applicant has not established a well-founded fear of future persecution. It appears that the threats the Applicant suffered were local in nature. The Applicant was able to live in Puerto Barrios, and not experience problems with the government. Applicant's parents are presently living in Puerto Barrios and not experiencing problems. Applicant has not established that the government has the inclination to pursue him. Applicant can relocate.
>
> For the foregoing reasons, Applicant is not eliglible [sic] for asylum in the United States. Assessment is to refer to the Immigration Judge.

(emphasis added).

Three aspects of this report are particularly noteworthy. First, the level of invented detail with which Martinez presented his false claim. Second, his ability to convince an experienced asylum officer that his swindle was credible; and third, Martinez's failure nonetheless to achieve a favorable asylum eligibility recommendation.

Having failed to convince the asylum officer that his phony political persecution story made him eligible for asylum, Martinez simply changed his tune,

shed his first yarn, and showed up three months later for a hearing before an IJ, armed with an entirely new ground designed to make him eligible for asylum. No longer had he been a victim of persecution on account of his political opinion. Now, euphemistically calling his bogus initial request "partially incorrect," he averred that he had been persecuted because of his homosexuality.

When confronted at his hearing with his previous story, Martinez conceded that both the elaborate tale he recounted in his initial request and then repeated in person three years later to the asylum officer was a fabrication. He allowed that he had taken an oath to tell the truth to the officer, but that he had lied anyway because his "life was in danger." When pressed, Martinez admitted that the asylum officer had not been intimidating and that he had never had any problem during the four years he had been in the United States with government officials because of his homosexuality.

The context of Martinez's lies under oath to the asylum officer was the subject of direct testimony by the officer, none of which supports the existence of a hostile interview atmosphere which would explain Martinez's adherence to his lies or his alleged fear of danger. The officer's testimony amply supports the IJ's disbelief of Martinez's explanation of his lies. Stating that he specifically recalled Martinez's interview, the officer said:

I, I do swear them in also. I think I stated that also, you know, as I was sworn today stating that he should tell the truth and such. We – I personally explain the procedure trying to make him feel as comfortable as possible letting them know what the next step is in the procedure even prior to getting to the interview. After explaining the procedure we go ahead and verify the biographical data on the I-589, okay, and ask for any other evidence that he may be willing to provide at that time. *We assure that the interview is very confidential, that nothing will get back to Guatemala. That's part of the procedure and basically trying to reassure the applicant we're there to help them if we can.* So they tell, tell us their complete story and we go, we go ahead over all the biographical information and also the, the testimony on the I-589. And we, we start – usually I start by asking him the application to tell me the most severe incidents that he experienced in Guatemala that compelled him to come to the United States. I make it clear that there are five grounds so there is not just, not just one ground that there – I also let them know that there is membership in political social-political group which is more or less a – membership in a, in a social group, excuse me. Not necessarily in a political group. I do ask whether he's, he's been a member of any groups or organizations, political or otherwise, other than the Catholic church per se. I, I do make it clear that there are five grounds. And we, we get into eliciting

> information, ascertaining that information for credibility, that's the majority of the interview. Okay. We stress credibility very highly and then upon completion of the interview I, I bring any changes that were made during the interview on the 589 or in testimony, anything that is inconsistent with what, what was explained originally. That is addressed. Upon addressing any inconsistencies we have the applicant sign stating that all the testimony that he has provided on the 589 and also his verbal testimony is true and correct.

(emphasis added).

In a thorough and detailed twenty-three page decision, the IJ arrayed every aspect of the case and evidence before him and then turned to Martinez's credibility. Noting that the burden to demonstrate eligibility rested with the petitioner, the IJ made the following lack of credibility finding:

> The Respondent has presented insufficient specific facts as well as concrete and/or credible evidence for the Court to infer that he has been persecuted or has a well-founded fear of persecution in Guatemala on account of his race, his religion, his nationality, his membership in a particular social group or his political opinion. The basis of the Respondent's claim to asylum before this Court was dramatically inconsistent with the claim presented to the INS in 1992 and reaffirmed before an INS asylum officer on November 13, 1995. Although Respondent

provides an explanation for the different claims I do not find that explanation to be credible.

In light of the Respondent's intelligence and more than three years time in the Los Angeles area during which time he appears to have freely associated with other gays and to have had no untoward difficulties with governmental authorities Respondent did not acquire the articulate intelligent relaxed demeanor which he exhibited in this Court overnight. Moreover, we have a situation where the Respondent did worse than neglect for whatever reason to refer to his "homosexual" claim in 1992 or 1995, he set forth "student/political" claim which was completely untrue and he knew it was untrue. The Respondent's prior experience does not entitle him to come to the United States and lie to a governmental official to secure benefits under the laws of this country. Based upon this conduct I find that Respondent's present claim of mistreatment due to his homosexuality lacks credibility and, indeed, that Respondent is not a person of good moral character as that term is defined at Section 101(f)(6) of the Act.

. . . .

The Respondent has applied for the privilege of voluntary departure pursuant to Section 244(e) of the Act as it existed prior to April 1, 1997. That section requires an alien to establish that he is a person of good moral

> character at least five years immediately preceding his application. Good moral character as a defined term in Section 101(f)(6) of the Act bars the finding of good moral character if the alien has given false testimony for the purpose of obtaining any benefit under the Act. In this case, Respondent is unable to establish statutory eligibility as he gave false testimony before an INS asylum officer on November 13, 1995 for the purpose of obtaining asylum in the United States pursuant to Section 208 of the Act.

Accordingly, Respondent's application for voluntary departure is denied on statutory grounds.

The BIA determined in its first Order denying asylum that Martinez had not presented a credible testimonial claim sufficient to satisfy his burden of proof. Addressing Martinez's attempted explanation for the difference between his two stories, the BIA said, "We are not persuaded by the respondent's explanations for this discrepancy." On remand, the Board affirmed its adoption in its first Order of the IJ's adverse credibility finding, this time giving reasons for its decision:

> On July 25, 2003, the Ninth Circuit remanded the instant proceeding to the Board after finding that the Board failed to provide a specific, cogent reason for rejecting the respondent's justification for misrepresenting the basis of his fear. Through his appeal, the respondent incorporates a motion to remand

to pursue relief under the Convention Against Torture ("CAT"). The respondent's appeal is dismissed. The respondent's motion is denied.

Upon review, we affirm our prior resolution of the instant case. Specifically, we find that the respondent failed to sustain his burden of proof regarding asylum as the result of his lack of credibility. The record reflects that the respondent twice misrepresented the basis of his fear while testifying under oath (Exhs. 2 and 12). Specifically, we note that the respondent initially claimed that he had been persecuted on account of his political opinion, however, he subsequently retracted this claim and instead, asserted that he suffered persecution on account of his sexual orientation. We find this discrepancy material as it goes to the heart of the respondent's asylum claim.

Although the respondent explained that the afore-mentioned misrepresentation was due to his fear of experiencing additional persecution if the United States government learned of his sexual orientation, we do not find his justification persuasive. As observed by the Immigration Judge, the respondent spent more than 3 years in the Los Angeles area freely associating with other gays and furthermore, he did not experience any problems with any United States governmental authorities (I.J. at 17). As further noted by the Immigration Judge, the respondent exhibited an "articulate, intelligent and

relaxed demeanor." *Id.* In sum, we adopted the Immigration Judge's decision below as the Immigration Judge articulated cogent reasons for his adverse credibility finding.

III

As the record reveals, Martinez repeatedly and persistently lied under oath with respect to his application for asylum. That his skillful lies were material and went to the heart of his presentation goes without saying. The IJ's reasons for his adverse credibility finding "bear a legitimate nexus" to his decision. *Salaam v. I.N.S.*, 229 F.3d 1234, 1238 (9th Cir.2000); and we can discern no flaw in either the IJ's or the BIA's cogent reasoning. *Gui v. I.N.S.*, 280 F.3d 1217, 1225 (9th Cir.2002). Thus, both the IJ and the BIA's specific adopted adverse credibility findings are well supported by substantial uncontroverted evidence in the record. *Al-Harbi v. I.N.S.*, 242 F.3d 882, 889-90 (9th Cir.2001) (affirming negative credibility finding supported by applicant's "propensity to change his story regarding incidents of past persecution").

An asylum seeker's incentive to lie is not curtailed by fear of the IJ's scrutiny or the government's fact checkers. These are only small obstacles that can be easily overcome. The major check on the asylum seeker's incentive to lie is an oath to tell the truth, and the asylum seeker's belief that he or she will be held to that oath. It is fair to say that the asylum process is ultimately an honor system – it depends

largely on the assumption that asylum seekers will take the oath seriously, and that they will be truthful in their testimony. The Ninth Circuit can do much to reduce the risk of error and to mitigate unfair procedures in immigration proceedings. However, in order for the process to work, we must construe and enforce the oath strictly, so that we may be more lenient elsewhere in the process. Accordingly, we deny Martinez's petition for review.[1]

Petition **DENIED.**

PREGERSON, Circuit Judge, Dissenting:

It was wrong for Martinez initially to tell a false tale about his persecution in Guatemala to immigration authorities. But it is not hard to see why a gay man who suffered persecution on account of his sexual orientation would want to hide that fact from immigration authorities. When Martinez filed his asylum application in 1992, the INS had not yet recognized that persecution on account of sexual orientation provided a valid basis for an asylum claim. *See Karouni v. Gonzales,* 399 F.3d 1163, 1171 (9th Cir.2005). Indeed, before the Immigration Act of 1990, homosexuality was a ground on which to *exclude* any immigrant who wished to enter this

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[1] We conclude that the BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case that warrants reopening under the Convention Against Torture.

country. *See* Pub. Law 101-649 § 601, 104 Stat. 4978, 5067 (1990); *see also* House Rep. No. 723(I), 101st Cong., 2d Sess., p. 56, reprinted in 1990 U.S.Code Cong. & Ad. News 6710, 6736. In this context, it is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation.

In reviewing an IJ's adverse credibility finding regarding an asylum petitioner, our court in *Turcios v. INS* stated: "Untrue statements by themselves are not reason for refusal of refugee status[,] and . . . it is the examiner's responsibility to evaluate [the petitioner's false] statements in the light of all the circumstances of the case." *Turcios v. INS,* 821 F.2d 1396, 1400 (9th Cir.1987) (finding that the lies petitioner told to immigration authorities actually *supported* petitioner's fear of deportation). If Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported. Instead, Martinez initially alleged political persecution, a valid basis for an asylum claim in 1992, because he greatly feared being returned to Guatemala. It was not until April 1996 that the INS "formally adopted the 'position . . . that homosexuals *do* constitute a particular social group.'" *Karouni,* 399 F.3d at 1171 (quoting a Memorandum from David A. Martin, INS General Counsel, to All Regional and District Counsel (Apr. 4, 1996)). On April 23, 1996, nineteen days after the INS recognized that persecution based on sexual

orientation was a valid ground for an asylum claim, Martinez explained his true reasons for seeking asylum in the United States in a detailed declaration.

Accordingly, I disagree with the BIA's finding that the IJ in the case before us "articulated cogent reasons for his adverse credibility finding." As in *Turcios,* the IJ's explanation that Martinez was not credible because initially he made false statements to immigration officials was insufficient. In fact, Martinez's statements may have "support[ed] his claim of fear of persecution," *Turcios,* 821 F.2d at 1401, because Martinez misrepresented the truth solely to avoid persecution in Guatemala based on his sexual orientation, in response to U.S. immigration policies forbidding such asylum claims at the time he made the statements.

Furthermore, nowhere does Martinez testify that he feared "additional persecution [in the United States] if the United States government learned of his sexual orientation," as the BIA and Majority contend. Instead, Martinez's fear was premised on his belief that he would be further persecuted if the United States government were to deport him to Guatemala. The Majority states that the IJ's reasons for his adverse credibility finding did "bear a legitimate nexus" to the IJ's decision. I disagree. That Martinez was "freely associating with other gays" in Los Angeles has no bearing on or nexus to the IJ's decision that Martinez was not credible, nor does it have any bearing on or nexus to the suffering Martinez feared he would experience were he

deported to Guatemala. Therefore the IJ's negative credibility finding – affirmed by the BIA – doesn't hold water.

Because the IJ did not articulate cogent reasons for his adverse credibility finding, and because the IJ did not provide a legitimate nexus between the reasons for his adverse credibility finding and his ultimate decision, Martinez's petition should not have been denied. Accordingly, I dissent.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70 217 803 – Los Angeles

Date: MAY 19 2004

In re: SAUL GREGORIO *MARTINEZ*

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Helen A. Sklar, Esquire

ON BEHALF OF DHS: Cassandra D. Casaus
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APPLICATION: Asylum; withholding of removal; remand

This case was last before the Board on April 30, 2002, when we affirmed the Immigration Judge's decision to deny the respondent asylum, withholding and voluntary departure. Subsequently, the respondent filed an appeal with the United States Court of Appeals for the Ninth Circuit, the jurisdiction within which this matter arises. On July 25, 2003, the Ninth Circuit remanded the instant proceedings to the

Board after finding that the Board failed to provide a specific, cogent reason for rejecting the respondent's justification for misrepresenting the basis of his fear. Through his appeal, the respondent incorporates a motion to remand to pursue relief under the Convention Against Torture ("CAT"). The respondent's appeal is dismissed. The respondent's motion is denied.

Upon review, we affirm our prior resolution of the instant case. Specifically, we find that the respondent failed to sustain his burden of proof regarding asylum as the result of his lack of credibility. The record reflects that the respondent twice misrepresented the basis of his fear while testifying under oath (Exhs. 2 and 12). Specifically, we note that the respondent initially claimed that he had been persecuted on account of his political opinion, however, he subsequently retracted this claim and instead, asserted that he suffered persecution on account of his sexual orientation. We find this discrepancy material as it goes to the heart of the respondent's asylum claim. *See Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990).

Although the respondent explained that the aforementioned misrepresentation was due to his fear of experiencing additional persecution if the United States government learned of his sexual orientation, we do not find his justification persuasive. As observed by the Immigration Judge, the respondent spent more than 3 years in the Los Angeles area freely associating with other gays and furthermore,

he did not experience any problems with any United States governmental authorities (I.J. at 17). As further noted by the Immigration Judge, the respondent exhibited an "articulate, intelligent and relaxed demeanor." *Id.* In sum, we adopted the Immigration Judge's decision below as the Immigration Judge articulated cogent reasons for his adverse credibility finding. *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

We now turn to the respondent's motion. Pursuant to regulation, a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . " 8 C.F.R. § 1003.2(c)(1); *see INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam). "No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening." *Matter of Sipus*, 14 I&N Dec. 229, 231 (BIA 1972). A decision to deny will depend "on the nature of the case and the force of the evidence already appearing in the record sought to be reopened." *Id.* Furthermore, a motion must state the new facts to be proved at reopening, supported by affidavits or other documentary evidence. 8 C.F.R. § 1003.2(c)(1). Finally, the decision whether to grant a motion to reopen is within the discretion of the Board. 8 C.F.R. § 1003.2(a).

In the instant case, we find that the respondent failed to establish a prima facie case that warrants reopening proceedings to allow him to seek relief

under the Convention Against Torture. *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). In particular, the respondent failed to establish that it is more likely than not that he will be tortured by government officials if returned to Guatemala. *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1). Accordingly, the respondent's motion to reopen is denied.

The following orders shall be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent's motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAUL GREGORIO MARTINEZ, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 04-72975 Agency No. A070-217-803 ORDER (Filed Sep. 8, 2009)

Before: PREGERSON, NOONAN and TROTT, Circuit Judges.

Judge Pregerson votes to grant the petition for rehearing and Judges Noonan and Trott have voted to deny the petition for rehearing. Judge Pregerson has voted to grant the petition for rehearing en banc and Judges Noonan and Trott recommend denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
FEB 16 2010
OFFICE OF THE CLERK

(2)

No. 09-665

In the Supreme Court of the United States

SAUL GREGORIO MARTINEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board of Immigration Appeals' conclusion that petitioner had not satisfied his burden of establishing his eligibility for asylum because of an adverse credibility determination.

2. Whether the Board of Immigration Appeals abused its discretion in concluding that petitioner did not state a prima facie claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

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Section 208.9(a) 2
Section 1208.13(a) 2
Section 1208.16(a) 3
Section 1208.16(b) 3
Section 1208.16(c) 3
Section 1208.16(c)(2) 4
Section 1208.18(a)(1) 3
Section 1208.18(b)(1) 8
Section 1240.8(d) 2

In the Supreme Court of the United States

No. 09-665

SAUL GREGORIO MARTINEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 557 F.3d 1059. A prior opinion (App., *infra*, 1a-4a) is not published in the *Federal Reporter* but is reprinted in 72 Fed. Appx. 564. The orders of the Board of Immigration Appeals (Pet. App. 18-21; App., *infra*, 5a-9a) and the decision of the immigration judge (App., *infra*, 10a-30a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. A petition for rehearing was denied on September 8, 2009 (Pet. App. 22). The petition for a writ of certiorari was filed on December 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings. Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*; see 6 U.S.C. 271(b)(3); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a). The Attorney General is responsible for conducting proceedings against an alien charged by the Department of Homeland Security (DHS) with being removable. 8 U.S.C. 1103(a)(1), 1229a(a)(1). Removal proceedings are conducted by immigration judges (IJs) within the Department of Justice, subject to appeal to the Board of Immigration Appeals (BIA). If an alien is unsuccessful in applying for asylum from DHS, his case is referred for institution of removal proceedings. The alien may renew his application for asylum before an IJ those proceedings.

The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Secretary of Homeland Security or the Attorney General. 8 U.S.C. 1158(b)(1).

b. An alien applying for asylum may also be considered for withholding of removal to a particular country under 8 U.S.C. 1231(b)(3)(A) and for protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.16(c).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "on account of [the alien's] race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. 1208.16(a) and (b). The burden of proof is on the alien. 8 C.F.R. 1208.16(b). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). A failure to satisfy the lesser standard of eligibility for asylum necessarily constitutes a failure to satisfy the more stringent standard for withholding of removal. See *Fisher* v. *INS*, 79 F.3d 955, 960 (9th Cir. 1996) (en banc).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain CAT protection. To qualify for CAT protection, the applicant must prove that the acts alleged to constitute torture would be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Zheng* v. *Ashcroft*, 332 F.3d 1186 (9th Cir. 2003). The burden of proof is on the applicant to show that it is more likely than not

that he would be tortured in the proposed country of removal. 8 C.F.R. 1208.16(c)(2).

c. A determination of adverse credibility is equivalent to a finding that an asylum applicant failed to carry his burden of proof and results in the denial of his claims. Under Ninth Circuit precedent, "[t]he BIA must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief." *Valderrama* v. *INS*, 260 F.3d 1083, 1085 (2001) (internal quotation marks omitted) (quoting *Shah* v. *INS*, 220 F.3d 1062, 1067 (9th Cir. 2000)).

In addition, a number of circuits, including the Ninth Circuit, have held that inconsistencies, inaccuracies or omissions can be the basis for adverse credibility findings only if they are material and go to the "heart" of petitioner's claim. See, *e.g.*, *N'Diom* v. *Gonzales*, 442 F.3d 494, 503 (6th Cir. 2006) (referring to discrepancy as going to "heart of [applicant's] claim"); *Singh* v. *Gonzales*, 439 F.3d 1100, 1105 (9th Cir. 2006) (minor inconsistencies are not sufficient; the reason for an adverse credibility determination "must 'strike at the heart of the claim' for asylum"); *Toure* v. *Ashcroft*, 400 F.3d 44, 48 (1st Cir. 2005) (inconsistencies described as "not minor" but going to "the heart of [applicant's] credibility").

In 2005, Congress changed the law related to credibility determinations. It provided that for asylum cases commenced after May 11, 2005, an IJ may reject an alien's claims based on an adverse credibility finding "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, § 101(a)(1), 119 Stat. 303 (8 U.S.C. 1158(b)(1)(B)(iii)).

d. An alien may obtain judicial review of a final agency decision to deny asylum, withholding of removal, or CAT protection through a petition for review in the court of appeals. See 8 U.S.C. 1252(a). A determination by the BIA can be reversed only if the evidence is such that a reasonable factfinder would be compelled to reach the opposite conclusion. 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992).

2. Petitioner is a native and citizen of Guatemala. Pet. App. 1. He entered the United States without inspection in May 1992. See App., *infra*, 35a. In September 1992 he filed an application for asylum and withholding of removal. Pet. App. 3. In that application he claimed that he had been persecuted for political activities as a student leader at the University of San Carlos. *Ibid.* Specifically, he alleged that he was threatened and that a number of his companions had disappeared. App., *infra*, 12a. He signed the application under penalty of perjury, avowing that the contents were "true and correct to the best of my knowledge and belief." Pet. App. 3. In 1995 he testified under oath to an asylum officer, who assured him that their interview was confidential. *Id.* at 4, 8. Petitioner reiterated his claim that he was a victim of persecution "on account of my political opinion." *Id.* at 4. He also swore to the officer that the contents of his original application were true. *Ibid.* The officer found him ineligible for asylum and referred him for removal proceedings. *Id.* at 5-6.

3. The Immigration and Naturalization Service (INS) charged petitioner with being deportable as an

alien who entered without inspection.[1] App., *infra*, 34a-48a; see 8 U.S.C. 1251(a)(1)(B) (1988).

At the first session of his removal hearing, on March 26, 1996, petitioner, through counsel, told the IJ that his application "was filled out by a notary and it has problems," and that he would file a "sworn declaration" with different facts and an explanation of why the ones in the application were not correct. App., *infra*, 32a-33a. On April 23, 1996, petitioner filed a declaration claiming that he had been persecuted in Guatemala because he is a homosexual. Pet. App. 16. He alleged that he had been beaten, kicked, and raped. App., *infra*, 15a-18a. During the course of his hearing, petitioner submitted testimony about the treatment of homosexuals in Guatemala and testified himself. *Id.* at 20a, 22a. He stated that he had fabricated the detailed story he told in his application and to the asylum officer because his "life was in danger." Pet. App. 7.

The IJ in April 1997 found petitioner not credible and denied asylum, withholding of removal, and voluntary departure. Pet. App. 9-11. The IJ explicitly stated that he did not find credible the explanation petitioner gave for the "dramatically inconsistent" claims he presented, "[i]n light of [petitioner's] intelligence and more than three years time in the Los Angeles area [*i.e.*, between his application in 1992 and his asylum interview in 1995] during which time he appears to have freely associated with other gays and to have had no untoward difficulties with governmental authorities." *Id.* at 9-10.

The IJ noted that petitioner had not just neglected to present a claim as a homosexual prior to his removal

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[1] The INS's immigration-enforcement functions have since been transferred to the DHS. See 6 U.S.C. 251.

hearing but affirmatively set forth another claim that he knew to be untrue. Pet. App. 9-10. The IJ explained that whatever bad experiences petitioner may have had in another country, he was not entitled to lie to a government official here to secure benefits, particularly when he had had "no untoward difficulties with governmental authorities" in the United States. *Id.* at 10. The IJ denied voluntary departure on statutory grounds, determining that petitioner could not demonstrate good moral character, having given false testimony in order to obtain a benefit under the INA. *Ibid.*; see 8 U.S.C. 1101(f)(6); 8 U.S.C. 1229c(b)(1)(B).

In April 2002 the BIA dismissed petitioner's appeal, holding that his two accounts were inconsistent and rejecting petitioner's "'explanations for this discrepancy." Pet. App. 11. In July 2003, a divided panel of the Ninth Circuit ruled that the BIA had "failed to provide cogent reasons for rejecting [petitioner's] testimony in support of his application," and remanded for further consideration. *Id.* at 1-2; App., *infra*, 1a-4a.

4. On remand, in May 2004, the BIA again dismissed petitioner's appeal. Pet. App. 18-21. The BIA determined that petitioner "failed to sustain his burden of proof * * * as the result of his lack of credibility * * *. We find [his] discrepancy material as it goes to the heart of [his] asylum claim." *Id.* at 19. The BIA did not find "persuasive" petitioner's "justification" for first claiming persecution on account of political opinion and then retracting that and claiming persecution on account of sexual orientation. *Id.* at 19-20.

The BIA adopted the IJ's decision "as the [IJ] articulated cogent reasons for his adverse credibility finding." Pet. App. 20. The BIA also denied petitioner's motion to reopen to seek protection under the CAT, finding that

he failed to establish a prima facie case, and "[i]n particular" failed to show that it was more likely than not that he would be tortured by government officials if returned to Guatemala. *Id.* at 21.[2] Petitioner filed a petition for review with the Ninth Circuit challenging both the adverse credibility finding and the denial of his motion to reopen to seek CAT protection. *Id.* at 2.

5. a. In March 2009, the Ninth Circuit denied the petition for review. Pet. App. 1-2. It said that "[t]he facts pertaining to [petitioner's] credibility—or the lack thereof—are striking." *Id.* at 3. The court noted that petitioner submitted his original request for asylum, in which he falsely claimed political persecution in Guatemala, under penalty of perjury. Then, "[t]he next step in what turns out to have been a plot to deceive the Immigration and Naturalization Service, the United States Department of Justice, and the Attorney General was to foil the asylum officer assigned to his case." *Id.* at 4.

The court of appeals noted that before the asylum officer, petitioner again falsely said that he had been the victim of persecution in Guatemala because of his political activities. Pet. App. 4. It quoted at length from the officer's report summarizing petitioner's testimony and said it found "noteworthy" both "the level of invented detail with which [petitioner] presented his false claim" and "his ability to convince an experienced asylum officer that his swindle was credible." *Id.* at 6. The court continued by noting that the officer nonetheless recommended against asylum eligibility, so petitioner "simply changed his tune, shed his first yarn, and showed up

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[2] Petitioner was unable to bring a CAT claim at his original hearing because that remedy was not available until 1999. Pet. 5 n.2. However, he could have filed a motion to remand on that basis before the BIA issued its first decision in April 2002. 8 C.F.R. 1208.18(b)(1).

three months later for a hearing before an IJ, armed with an entirely new ground designed to make him eligible for asylum." *Id.* at 6-7.

The court of appeals thus concluded that petitioner "repeatedly and persistently lied under oath" and that "his skillful lies were material and went to the heart of his presentation." Pet. App. 13. The majority also found that the reasons for the adverse credibility finding "bear a legitimate nexus" to the decision to deny asylum, are "cogent," and are "well supported by substantial uncontroverted evidence in the record." *Ibid.*

The court went on to observe that the asylum process is "ultimately an honor system" that depends on the assumption that asylum seekers would take the oath seriously and be truthful. Pet. App. 13. It stated that, "in order for the process to work, we must construe and enforce the oath strictly." *Id.* at 14.

Finally, the court held that "the BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case that warrants reopening under the [CAT]." Pet. App. 14 n.1.

b. Judge Pregerson dissented from the decision to sustain the asylum denial. In his view, "it is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation." Pet. App. 15. Judge Pregerson reasoned that persecution on account of sexual orientation was not recognized as a valid basis for an asylum claim when Martinez filed his application in 1992, and that prior to the enactment of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, homosexuality was a ground

of exclusion.[3] Pet. App. 14-15. Judge Pregerson found that under circuit precedent the IJ had not given cogent and sufficient reasons for his adverse credibility finding. *Id.* at 16. He did not comment on petitioner's CAT claim.

6. A petition for rehearing was denied in an unpublished order. Pet. App. 22.

ARGUMENT

1. Petitioner presents no issue warranting this Court's review. He claims there is a circuit split on the question "whether a false statement that does not go to the heart of an alien's operative asylum application" (made before the effective date of the REAL ID Act) "automatically disqualifies an asylum applicant from relief." Pet. i. In his view, the Ninth Circuit in the decision below answered that question in the affirmative, adopting "a *per se* rule that * * * a false statement made in the course of seeking asylum may bar relief whether or not the false statement actually goes to the heart of the applicant's operative asylum application." Pet. 7-8. The Ninth Circuit did not adopt the view ascribed to it by petitioner, and there is no circuit split.

The court of appeals in this case concluded that it "goes without saying" that petitioner's misrepresentations *did* go "to the heart" of his request for asylum. Pet. App. 13; see *id.* at 19 (BIA concluding that misrepresentations went "to the heart of the * * * asylum

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[3] This statement is incomplete. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990), a Cuban asylum applicant was granted withholding of removal based on his membership in a particular social group, homosexuals. *Toboso-Alfonso* was decided in 1990 and was designated a precedential decision by the Attorney General on June 19, 1994, prior to petitioner's 1995 interview with an asylum officer. *Id.* at 819 n.1.

claim"). Thus, the court evaluated petitioner's claim under the more applicant-friendly standard he favors and still found it wanting.

Petitioner believes that his misrepresentations did not in fact go to the "heart" of his request. Pet. 10-11. The lower court, however, found substantial evidence supporting the BIA's conclusion to the contrary, based on the specificity and brazenness of petitioner's misrepresentations, the timing of his decision to replace them with a newly-minted story of persecution, and the unpersuasiveness of his explanation for the change. Pet. App. 3-13. To reverse that finding, petitioner would have to show that "the evidence not only *supports*" his view of the case, "but *compels* it." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992). He cannot surmount that high hurdle, and, in any event, the factbound question of whether petitioner's false statements "went to the heart" of his application for asylum is not appropriate for this Court's review.

Petitioner cites cases in which courts have held that an applicant's misrepresentations were too trivial or unrelated to warrant an adverse credibility determination. Pet. 9 & n.4. Petitioner fails to recognize the inherently fact-intensive, case-by-case nature of credibility determinations. None of the cases petitioner cites adopts a "*per se* rule" stating that an applicant's admitted and extensive false statements made at an earlier stage of an asylum application proceeding can never provide a basis for an adverse credibility determination.[4]

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[4] In *Guo* v. *Ashcroft*, 386 F.3d 556, 562 (2004), the Third Circuit concluded there was insufficient evidence to support the BIA's adverse credibility determination. That determination had been based on a finding of lack of credibility in connection with an earlier request for asylum, and "[n]o one ha[d] explained how the IJ's adverse credibility

Similarly, nothing in the Ninth Circuit's decision in this case adopts a "*per se* rule" that earlier misrepresentations must always lead to an adverse credibility determination.

There is thus no circuit split (or "intracircuit conflict[]" within the Ninth Circuit). Pet. 12. Instead, all these courts conduct case-by-case reviews of fact-intensive credibility determinations by IJs and the BIA and

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findings implicated Guo's motion to reopen on a ground not previously dealt with by the IJ." *Ibid.* Here, by contrast, the BIA expressly explained the connection between the two stages of petitioner's proceedings. It concluded that the explanation petitioner offered—in the stage of his proceeding at issue here—for his prior false statements and for his decision to request asylum on an entirely new basis was not credible. Pet. App. 19-20. The other cases petitioner cites as supporting his position are either entirely inapposite or turn on the courts' intensive review of the records before them. See *Ucelo-Gomez* v. *Gonzales*, 464 F.3d 163, 167 (2d Cir. 2006) (court could not determine "whether (or how)" adverse credibility determination "bears upon matters that go to the heart of [the] claim" because there was "a more fundamental problem" with BIA decision related to whether applicant was member of protected social group); *Diallo* v. *Gonzales*, 445 F.3d 624, 630 (2d Cir. 2006) (IJ's "adverse credibility finding was supported by substantial evidence" as he "was not required to accept [applicant's] explanation" for "inconsistent statements"); *Uanreroro* v. *Gonzales*, 443 F.3d 1197, 1211 (10th Cir. 2006) (lies told to enter country can support adverse credibility determination but did not when considered in light of "the 'totality of the circumstances' surrounding [the] asylum applicant's claim"); *N'Diom* v. *Gonzales*, 442 F.3d 494, 496 (6th Cir. 2006) (case did not involve any false statements by applicant, only "omissions to state a particular detail" in earlier statements); *Shtaro* v. *Gonzales*, 435 F.3d 711, 716 (7th Cir. 2006) (court addressed alleged inconsistencies between applicant's statements and letters written by others, not inconsistencies in applicant's own sworn statements); *Mece* v. *Gonzales*, 415 F.3d 562, 572-578 (6th Cir. 2005) (detailed discussion of record and explanation why substantial evidence did not support IJ's adverse credibility determination).

determine, based on the unique facts and circumstances of each case, whether those determinations are supported by substantial evidence.

2. Petitioner acknowledges that the REAL ID Act changed the rules governing credibility determinations for asylum cases (unlike his) commenced after May 11, 2005. Pet. 8. That statute provides in relevant part that "a trier of fact may base a credibility determination on * * * any inaccuracies or falsehoods in [an applicant's] statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim." READ ID Act § 101(a)(1), 119 Stat. 303 (8 U.S.C. 1158(b)(1)(B)(iii)).

That statute "implemented an important substantive change concerning the kinds of inconsistencies that may give rise to an adverse credibility determination." *Shrestha* v. *Holder*, 590 F.3d 1034, 1043 (9th Cir. 2010). In particular, under the statute, "[i]nconsistencies no longer need to 'go to the heart' of the petitioner's claim to form the basis of an adverse credibility determination." *Ibid.*

Petitioner is correct that there remain pre-REAL ID Act cases before the agency and the courts, Pet. 14, but the number of such cases is necessarily declining. Especially given the absence of a circuit conflict and the inherently fact-bound nature of the issue, there is no reason for the Court to devote a portion of its limited resources to addressing the standard for credibility determinations in a pre-REAL ID Act case like this one. Whatever guidance such a decision provided would have a limited practical effect as more and more asylum cases were evaluated under the new statutory standard.

3. Petitioner also contends (Pet. 15-20) that the Ninth Circuit erroneously denied him CAT protection

solely due to the adverse credibility finding made with respect to his asylum application, and that this Court should resolve a circuit split on the issue of whether an adverse credibility determination concerning asylum "automatically disposes of" a claim for CAT protection. Pet. 15.

Petitioner concedes (Pet. 16), however, that the Ninth Circuit's decision affirming the BIA on this issue consists of only a "single-sentence footnote" stating that the "BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case." *Ibid.* (quoting Pet. App. 14 n.1). Neither the BIA nor the Ninth Circuit cited the adverse credibility finding as a basis for denying petitioner's CAT claim. The BIA might have found that petitioner's CAT claim was deficient for some other reason. See, *e.g.*, *Kamalthus* v. *INS*, 251 F.3d 1279, 1283 (9th Cir. 2001) (CAT applicant must demonstrate it was " 'more likely than not' that he * * * will be tortured, and not simply persecuted upon removal.").

In any event, the Ninth Circuit's unexplained decision would provide a poor vehicle for review of petitioner's CAT claim, especially in light of the fact that when the Ninth Circuit did explicitly address the question in another case it adopted the position favored by petitioner. See Pet. 19 (citing *Kamalthas*, 251 F.3d at 1283). Any intra-circuit conflict between other Ninth Circuit decisions and that court's brief disposition of the CAT issue here would not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

FEBRUARY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-71478
Agency No. A70-217-803

SAUL GREGORIO MARTINEZ, PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

DECIDED: JULY 25, 2003

MEMORANDUM*

BEFORE KLEINFELD, WARDLAW, CIRCUIT JUDGES, AND POGUE, CIT JUDGE.**

Saul Martinez, a native and citizen of Guatemala, petitions for review of the decision by the Board of Immigration Appeals denying his application for asylum and request for withholding of deportation. We have

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald Pogue, U.S. Court of International Trade, sitting by designation.

jurisdiction under 8 U.S.C. § 1105a (repealed 1996) and we grant the petition.

As both parties conceded, the BIA undertook an independent analysis of Martinez's testimony and "agreed with," but did not adopt, the IJ's decision that Martinez's description of past persecution was not credible. *See Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000) ("Where the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent the IJ's opinion is expressly adopted."). The adverse credibility determination resulted from Martinez's misrepresentation on his initial asylum application that he had been persecuted based on political belief, rather than sexual orientation. He explained the misrepresentation was due to a fear of facing further persecution if the government learned of his sexual orientation.

The BIA provided no "specific cogent reasons" for rejecting this justification. *Valderrama v. INS*, 260 F.3d 1083, 1085 (9th Cir. 2001). Moreover, "misrepresentations [that] are wholly consistent with [petitioner's] testimony and application for asylum" do not support a negative credibility finding. *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999); see also *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002). Because the BIA stated only that it was "not persuaded by respondent's explanations" and provided no legitimate, let alone cogent, reason for rejecting Martinez's "wholly consistent" misrepresentation, we remand for proceedings consistent with this disposition.

PETITION GRANTED.

KLEINFELD, Circuit Judge, dissenting. KLEINFELD, Circuit Judge.

I respectfully dissent. The BIA rejected Martinez's credibility because "the claim the respondent presented before the asylum officer was inconsistent with the one he pursued at the hearing." He had fair notice from the IJ's decision of this reason for rejecting his credibility, and tried to explain it away in his appeal to the BIA, but the BIA was "not persuaded by the respondent's explanations for this discrepancy."

Martinez twice lied under oath to the INS. He invented a story about having been a member of a student-led political activist group. As he later admitted, this story was entirely untrue. Such "material misstatements of fact" and "gross inconsistencies" in an application for asylum that "involve[ ] the heart of the asylum claim" may provide substantial evidence for an adverse credibility finding. *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990).

In *Ceballos*, we explicitly distinguished such falsehoods from the incidental falsehoods told in *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987). The majority relies on *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) for the proposition that Martinez's previous lies are "wholly consistent" with his claim of fear of future persecution. *Akinmade*, relying on *Turcios*, addresses a different situation than that in the case at bar. Here, as in *Ceballos*, the asylum applicant did not lie about his country of origin or incidental details of his past, but rather completely invented the entire basis for his claim for asylum. His previous story cannot be "wholly consistent" with his current story, since he has admitted the previous story to be entirely false. Rather, this is the

"180 degree" change that we held in *Ceballos-Castillo* to be substantial evidence for an adverse credibility finding.

The IJ articulated a legitimate, cogent reason for his adverse credibility finding, namely the fact the Martinez lied to the INS in his prior application, and the BIA clearly adopted that reason as well, noting as it did that it was unpersuaded by Martinez's attempt to explain that reason away. The deferential standard of review requires that we deny the petition.

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Reviewd

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Date: [Apr. 30, 2002]

File: A70 217 803 - Los Angeles

In re: SAUL GREGORIO *MARTINEZ*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
HELEN A. SKLAR, Esquire

ON BEHALF OF SERVICE:
CASSANDRA D. CASAUS
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)]— Entered without inspection

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. The respondent appealed the Immigration Judge's decision of April 4, 1997, which denied his applications for asylum and withholding of deporta-

tion under sections 208(a) and 243(h) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(a), 1253(h). We deny the request for oral argument. *See* 8 C.F.R. § 3.1(c). The appeal is dismissed.

The question presented in this case is whether the respondent has presented a credible testimonial claim sufficient to satisfy his burden of proof in establishing his eligibility for asylum. The Immigration Judge denied the respondent's asylum application on the basis of an adverse credibility finding. *See Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000); *Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998). The Immigration Judge noted that the claim the respondent presented before the asylum officer was inconsistent with the one he pursued at the hearing. We are not persuaded by the respondent's explanations for this discrepancy. *See* I.J. at 17-19; Respondent's Brief on Appeal, September 18, 1998.

We agree with the Immigration Judge that the respondent failed to establish past persecution or a well-founded fear or clear probability of persecution in Guatemala based on one of the five protected statutory grounds of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158, 1253(h); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), *Valderrama v. INS*, 260 F.3d 1083 (9th Cir. 2001); *Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Accordingly, the Immigration Judge's decision is affirmed and the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

Date: [Apr. 30, 2002]

File: A70 217 803 - Los Angeles

In re: Martinez

CONCURRING OPINION: Roger A. Pauley

In this case, the respondent on two separate occasions, in 1992 in writing and in 1995 in testimony before an Immigration asylum officer, submitted false applications for asylum under penalty of perjury based on a fabricated claim that he was persecuted by the government of Guatemala because he was the leader of a political student group at the University of San Carlos.

The respondent left Guatemala in November 1991 and came to the United States where he lived in California openly as a homosexual for several years before filing his present asylum claim based on a series of incidents in Guatemala in which he was physically assaulted and raped on account of his homosexuality by members of the Guatemalan police and thugs hired by the wife of a Guatemalan congressman who learned of the respondent's affair with her husband. See IJ at 5-10. The respondent also introduced testimony from an expert on homosexual males in Guatemala who testified that respondent, as a visibly effeminate homosexual, would be at risk of harm in Guatemala due to its "machismo" cul-

ture and from the police, many of whom have a "hunting license" attitude toward homosexuals, and that a homosexual cannot expect redress from the Guatemalan courts. IJ at 12-14.

The Immigration Judge concluded, as do the majority, that due to the fact the respondent's latest asylum claim is markedly different from his earlier claims, he lacks credibility as to his current claim. I, however, am inclined to credit his current claim and to believe that he established eligibility for asylum. See Matter of OZ & IZ, 22 I&N Dec. 23 (BIA 1998); Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

I would nonetheless deny asylum in the exercise of discretion. While discretionary denials are rare, the respondent in this case committed perjury in an effort to obtain an immigration benefit. Moreover, he offered no persuasive explanation for why, not under compulsion of being in proceedings or subject to a time restriction on the filing of an asylum application, he twice submitted false applications. See Matter of Pula, 19 I&N Dec. (BIA 1987). See also IJ at 17 (finding, as do I, that resp0ndent's "'explanation" for his prior claims is incredible).

I therefore respectfully concur.

/s/ ROGER A. PAULEY
ROGER A. PAULEY
Board Member

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
LOS ANGELES, CALIFORNIA

File No.: A 70 217 803

IN THE MATTER OF
SAUL GREGORIO MARTINEZ, RESPONDENT

IN DEPORTATION PROCEEDINGS

Date: Apr. 4, 1997

CHARGE: 241(a)(1)(B)—entry without inspection.

APPLICATIONS: Asylum, withholding, voluntary departure in lieu of deportation.

ON BEHALF OF RESPONDENT:

ON BEHALF OF SERVICE:

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a thirty-two year old male alien, native and citizen of Guatemala who entered the United

States on May 14, 1992 without inspection. In pleading to the Order to Show Cause dated November 17, 1995, (Exh. No. 1), Respondent admitted the factual allegations while conceding and I'm satisfied that he's deportable on the charge set forth therein. Respondent declined to designate a country of deportation. I directed deportation to Guatemala.

Respondent submitted a request for asylum and/or withholding of his deportation to Guatemala dated September 21, 1992, (Exh. No. 2). That request was forwarded to the Department of State on November 14, 1995, which did not provide any specific response (Exh. 3). Attached to Respondent's original application for asylum is an amended application which notes that information contained in block numbers 18 through 21 is incorrect and that the correct information is contained in Respondent's declaration. Referring to Respondent's declaration dated April 23, 1996, which was admitted into evidence as Exhibit No. 4.

Respondent submitted additional documentation in support of his application for relief (Exh. No. 5). Respondent also presented a vitae or resume for Steven O. Murray (Exh. No. 6) and Heather H. McClure (Exh. No. 7), both of whom testified during the proceedings, Respondent's birth certificate (Exh. No. 8), and a letter of recommendation from Peter E. Riess, an account manager at Respondent's place of employment (Exh. No. 9). Mr. Riess as well as Respondent's life partner, Charles Coleman also testified on behalf of Respondent's applications for relief.

The Service presented two Department of State profiles for Guatemala dated May, 1996, (Exh. No. 10) and February, 1997, (Exh. No. 11). A copy of Respondent's

Request for Asylum is marked up by the INS asylum officer who interviewed the Respondent (Exh. No. 12). A copy of the asylum officer's interview notes (Exh. No. 13) for identification purposes only and the typed assessment of the asylum officer dated November 14, 1995, (Exh. No. 14). The Service also presented the testimony of that asylum officer, John Jaworski.

In his written request for asylum dated September 21, 1992, (Exh. No. 2), Respondent stated that he was seeking asylum "because in Guatemala I was threatened by the government because I was in the University of San Carlos. I was leader of the students in the University of San Carlos and for this reason the government persecuted and threatened me. I am afraid to return to Guatemala because many of my companions to disappear completely and I can too disappear likewise and I was constantly threatened by the government and my life was in more danger than the rest of the people of my country. If I didn't leave I would have been killed. The constant conflicts that exit in Guatemala, no security for anyone. In my case that I belonged to student groups is very hard to live in Guatemala." Respondent further stated in this application that he belonged to this student group from 1986 to 1991 and that his duties were to organize political meetings and the students.

On September 21, 1992, Respondent signed his written request for asylum declaring under penalty of oath that the above and all accompanying documents are true and correct to the best of his knowledge and belief, (Exh. No. 2). On November 13, 1995, Respondent again signed the above request for asylum, this time before an INS asylum officer. On this occasion Respondent swore that he knew the contents of this application which he

was signing and that they were true to the best of his knowledge (Exh. No. 12). Respondent provided additional circumstances at the INS asylum interview which the interviewing asylum officer summarized as follows: "Applicant credibly testified that in January, 1991 he became a leader in a student club at San Carlos University. Applicant stated that he began having problems due to his political opinion after participating in Mardi Gras type parades with political overtones. Applicant began receiving threatening phone calls in January, 1991, and believed that agents of the government were responsible. Applicant did not state a political opinion in response to the phone calls. Applicant stated that the calls persisted through June, 1991, when Applicant went to visit his parents in Puerto Barios (phonetic sp.). Applicant did not experience any problems in Puerto Barios, stated that it was a remote little town far from Guatemala City. In August, 1991, Applicant was chased by a car. Applicant was not harmed although he believed the government was responsible. In November, 1991, Applicant was again chased by a car and shot at. Applicant was not harmed and believed that the government was trying to scare him. Applicant left Guatemala the next day and traveled through Mexico prior to coming to the United States. Applicant further stated that he has a brother who is currently living in Guatemala City and not experiencing any problems with the government. Applicant's family is presently living in Puerto Barios and not experiencing problems with the government." (Exh. No. 14)

Respondent's written declaration dated April 23, 1996, (Exh. No. 4) and his testimony at these deportation proceedings reflect the following: In his detailed declaration dated April 23, 1996, (Exh. No. 4) and his

subsequent testimony Respondent set forth the basis of his claims for relief before this Court. Respondent described his experience as a young child, his relationship with various family members, his first homosexual experience at the age of 12 with a man who visited his hometown of Puerto Barios, and subsequent experiences at about the age of 14 with teenage boys in the same town. When it became clear to the Respondent that his immediate family was unable to accept his homosexuality Respondent moved to the home of a paternal uncle, his wife and their adopted son. About six months later the uncle and his wife died in an auto accident. In January, 1980 Respondent with the assistance of his cousin enrolled at an expensive school for the children of wealthy people (Respondent's cousin who is the sole beneficiary of his deceased father's estate acted pursuant to his father's prior direction in making arrangements for Respondent to attend this school). Respondent described his experience as a gay person at the school and his subsequent relationship with one of the teachers, Miguel Cerna. When Respondent reached the tenth grade he changed schools as his cousin wanted Respondent to study accounting. When Respondent's cousin learned about Respondent's relationship with Mr. Cerna, the cousin asked Respondent to leave the house in which Respondent had been living with this cousin. Respondent moved in with Mr. Cerna in the same hometown of Puerto Barios. In 1984 Respondent and Mr. Cerna moved to Guatemala City. His life had become very hard in Puerto Barios where people were reluctant to talk to Respondent presumably out of fear that they would be accused of being gay. In Guatemala City Respondent sensed he had initial difficulty getting work in that city because he was effeminate (at the outset of his

declaration Respondent described himself as being a relatively effeminate man and later in his declaration he speculates that he initially had difficulty obtaining work in Guatemala City due to this characteristic). Respondent was finally hired as a warehouseman, delivery man at the international airport through the assistance of a friend who was the brother-in-law of the airport manager. One year later Respondent was promoted to assistant sales man. Although Respondent enjoyed an "okay" working relationship with his fellow employees they sometimes made jokes about Respondent's lifestyle. In December, 1988 two airport policemen beat up the Respondent, specifically, at about 7 p.m. the airport policemen approached the Respondent who was standing at a bus stop about one block from his place of employment. The airport police then asked Respondent if he had a girlfriend, whether he liked men. One of the policemen then hit Respondent in the stomach. When another policeman tried to kick Respondent between the legs, Respondent crossed over and thus the kick landed on Respondent's hip. When the policeman challenged Respondent to show them he was a man, Respondent threatened to report them to which they responded that Respondent did not dare, that he should remember they could remove him from the face of the earth. As a result of this altercation Respondent's breath was taken away and he experienced pain for a week. He did not go to any hospital nor did he report the incident to authorities as he assumed that their superiors would not help a gay person. In June, 1989, police harassed Respondent a second time. On this occasion Respondent went into a washroom at work to wash his hands, two airport policemen entered and were standing to Respondent's left. Respondent looked over and saw that one of the police-

man had taken out his penis and was holding it. As Respondent looked over, the policeman said, "Hey, sissy, don't you want it?" When the other policeman pushed Respondent into the corner someone else also entered the men's room and Respondent ran out. Respondent was not harmed on this occasion and did not report the incident to any authority. In March, 1990 some city police harassed the Respondent. Specifically, three policemen approached the Respondent from the rear as he crossed the street to a bus stop. The policemen threw Respondent .to the ground, kicked him and one of them called the Respondent a butterfly. When Respondent attempted to run away one of the officers grabbed him by the shirt and shoved him against a wall. Then Respondent ran away, eventually boarded a bus, bleeding from his nose and mouth and went home. As a result of this incident Respondent suffered a swollen mouth and bruises to his chest and leg. He did not go to any hospital for medical treatment and did not report the incident to authorities as he was afraid to report it as he assumed he wouldn't get help. In May, 1990, Respondent met a Guatemalan congressman, Roberto Diaz and they began a sexual relationship with each other. Diaz's initial interest in Respondent as well as Respondent's initial interest in Diaz was sexual and thus they did engage in consensual sex. Two months later Diaz invited Respondent to his farm where they again had sex. The workers at the farm knew that Diaz and Respondent slept in the same bedroom. While at the farm, Diaz told Respondent that he was a congressman and married. Up to that point Respondent thought Diaz was not married. Upon hearing that Diaz was married, Responded resolved to end the relationship but did not tell Diaz. Respondent also testified that Mr. Diaz had adult children. In any

event, the next time Respondent saw Diaz the latter informed Respondent that his wife knew about Respondent and that the two of them had spent the weekend at the farm. Respondent did not respond to that. When Mrs. Diaz phoned Respondent at work, Respondent told her that Diaz was his friend to which Mrs. Diaz responded "that's bullshit" and warned Respondent that she had influence and could do anything to Respondent. Two weeks later as Respondent was returning home a government car stopped next to Respondent and three men got out and began to beat Respondent. The men referred to Respondent using a Spanish word which was roughly equivalent to "queer" and "faggot". When a neighbor came out the men left. Respondent suffered bruises on his stomach, chest, arms and a swollen forehead. Respondent did not go to a hospital but self-treated himself with some ice, staying home for two days. Respondent who felt lost and terrified that these men beat him because, one, Respondent was gay; two, Mrs. Diaz put them up to it because Respondent was gay and allowed her husband to have this conduct; and three, Mrs. Diaz was upset about the fact that Respondent, a gay person, had had an affair with her husband. Two weeks later Respondent received a call at work from the person who had beaten him. The caller told Respondent "this time you were lucky, the next time you will be worse". Respondent then phoned Diaz and told him what had happened. Diaz admitted that his wife was responsible for both the beating and the phone call and then hung up on the Respondent. That same day Respondent resigned from his job and went to live with a friend, Rudy. In October, 1991, Respondent and Rudy went out to a restaurant/bar to celebrate Halloween where they overheard some people tell some other peo-

ple that they were army members, that "maricones" are full of AIDS and that these other people (apparently some gays) were the cause of the disease. Before there was any problem Respondent and Rudy decided to leave the restaurant. In November, 1991, a government car pulled up to Respondent as he was walking home. Diaz, who was at the wheel told Respondent to get in. When Respondent declined two armed men got out of the car and pushed Respondent into the car. Diaz drove to a motel where Diaz paid for a room and the two men forced Respondent to undress and enter the bedroom where Diaz raped the Respondent without any protection or lubricant. The latter circumstance hurt the Respondent. Respondent claims that Diaz told Respondent that if Respondent didn't do as Diaz told him his two bodyguards would kill Respondent. (Respondent claims that on previous sexual encounters there had been protection as Respondent who appreciated the danger of AIDS provided the protection. Respondent claims that he and Diaz had never discussed the subject of AIDS.) After some time Diaz dressed and left in the car and Respondent took a bus home. Respondent does not know why Diaz raped him. Respondent assumes that Diaz is a predator. Respondent acknowledges that Diaz never expressed any interest in Respondent other than to satisfy Diaz's sexual urges. Respondent also acknowledges that he, the Respondent, previously had had sex with other men in Guatemala, both as a penetrator and penetratee. Respondent noted that Diaz's bodyguards had removed his address book from his pants pocket and thus were able to learn Respondent's address. Given all these events Respondent contacted a friend in Los Angeles named Alfredo. Respondent had met Alfredo while the latter had vacationed in Guatemala. Alfredo

sent money to Respondent to travel to the United States. On December 1, 1991 Respondent entered Mexico and on May, 1992 Respondent arrived in the United States. Alfredo, who died from AIDS in October, 1995, introduced Respondent to his friend, Richard. Respondent and Richard became roommates.

Respondent claims that he fears for his life in Guatemala as he is homosexual. Respondent acknowledges that he stays away from politics. He claims that he fears everyone in Guatemala as the Guatemalan people, especially those in power (the police and army) do not accept homosexuality. Respondent has no other fears (Tape 9) of returning to Guatemala. Respondent acknowledged that he completed the "request for asylum" (Exh. Nos. 2/12) and offered the following explanation for his failure to make reference to his homosexuality and the problems resulting from that status in this first written request for asylum. To wit, in 1992 Respondent simply could not admit that he was homosexual. Respondent further acknowledged that the information set forth in Exhibit Numbers 2/12 wasn't true. Respondent admits that after being placed under oath by the asylum officer who interviewed him on November 13, 1995, he still did not tell the truth to that officer as he feared for his life. Respondent testified that he has never felt comfortable stating that he is homosexual to a government official or a stranger. Now he knows that he can tell the truth and, thus, he is no longer afraid to say that he is gay, that he reached the point where he was able to admit that he's a homosexual about a year ago. Respondent still fears for his life, claims that he is telling the truth as to the reason. Respondent also stated that he did not bring an interpreter to the interview before the asylum officer and that he spoke less English at that point in time than

he does at present. At the same time Respondent acknowledged that in California he is openly gay.

Respondent presented the testimony of a Dr. Steven Murray who has conducted studies about homosexual males in Guatemala and written about "machismo in Latino cultures". The witness was deemed an expert on the question of whether it would be safe for Respondent, an admitted homosexual, to return to Guatemala. Dr. Murray who met the Respondent a little over an hour prior to the individual hearing at which the witness testified read the Respondent's declaration in late 1996. Based upon those contacts Dr. Murray testified that he had formed the opinion that it would not be safe for Respondent to return to Guatemala for the following reasons. One, Respondent is a visibly effeminate male and this circumstance would cause people to assume that he is homosexual and to hit on him. By "effeminate" Dr. Murray meant, first, a lack of physical aggressivity (2% of males are gender variant, being effeminate is innate) and second, the person walks/talks like a woman. Two, someone is likely to learn that Respondent is homosexual and then demand sex from him or beat him. The witness explained that in Guatemala a homosexual is thought to be sexually receptive. There is a cultural view that anyone who is not masculine-like is vulnerable and likes to be taken. Indeed, a disproportion number of policemen have a hunting license attitude toward homosexuals. Three, congressman Diaz creates a problem for Respondent for the following reason. In Guatemala's culture the insertive party in sex does not consider himself to be a homosexual. The insertive party simply views himself as a man making use of another male available to him. The insertive party views himself as a being a man acting upon his own controllable sexual

urge. When asked why such an individual would satisfy his sexual urge with a man rather than a woman the witness stated that women were not readily available in Guatemala. In Guatemala's culture, women are generally kept in seclusion. Also, prostitutes are expensive. Thus, we have a situation where the so-called "insertive party" does not possess so much a preference for the male body as a wish to have sex in a land of sexual scarcity. The witness further explained that the "insertive party" in this scenario does not view himself as being at risk from AIDS as people like him perceive AIDS to be transmitted from an active homosexual to a passive homosexual. As the "insertive party" or perpetrator does not view himself as being homosexual he does not view himself as being part of the risk group for AIDS, and summarize, given the general pattern, congressman Diaz doesn't consider himself a homosexual. A homosexual is someone who is sexually penetrated, not the penetrator, an effeminate male is thought to be the penetratee. Four, Respondent may be at risk of harm from the thugs of congressman Diaz. In the witness' opinion, the thugs follow directions from Diaz's spouse. The witness pointed out that Mr. Diaz and Mrs. Diaz had different agendas. Mr. Diaz wanted Respondent back. Mrs. Diaz wanted to keep Respondent away and quiet. In Guatemala discretion, not fidelity is what is expected of a husband. More than anything this situation would be embarrassing to Mrs. Diaz but due to the lack of discretion it would not stigmatism congressman Diaz if it were known that he raped men. However, if he had dealings with the U. S. Government it might complicate those dealings. Five, Respondent may be at risk by virtue of his having filed for asylum. Six, Guatemalan society is not ruled by law or due process. One can't

expect to go to court and receive any redress. The police are used to acting independently. They are not under orders from the top and they are used to being questioned. Seven, if something were to happen to Respondent in Guatemala there would be no counseling available to him. Under these circumstances Respondent took the most rational course of action, i.e. to flee.

Respondent also presented the testimony of Heather McClure who provided background information regarding conditions for gays and lesbians in Guatemala.

The Respondent called two additional witnesses to testify on his behalf. First, Peter Ernst Riess identified himself as being an account manager at Pitney Bowes, Respondent's present employer. As such Mr. Riess has supervised Respondent the past year. He described Respondent as being an excellent employee who doesn't require any supervision, an honest person whom the witness trusts. Second, Paul Charles Coleman identified himself as being Respondent's boyfriend/life partner. They have had a sexual relationship the past year and some months. Although Respondent and the witness are together six days a week they maintain separate addresses. The witness has observed Respondent during these proceedings to be stressed and fearful of deportation. The witness acknowledged that the stress could be out of fear of deportation. The witness stated that while they both are committed to the relationship they do not plan to live together. The relationship has been monogamous for the witness. The witness believes Respondent is telling the truth as Respondent fears returning to Guatemala.

The Immigration Service presented the testimony of John Jaworski. Mr. Jaworski identified himself as being

the INS officer who interviewed Respondent in connection with Respondent's first request for asylum, (Exh. No.2/12). The witness explained the procedure which he follows in conducting an asylum interview. He also stated that he recalled his interview of the Respondent. The witness identified his notes and indicated that they were consistent with Respondent's story account as set forth on the form 1-589, Exhibit Number 2/12, originally received by INS on October 6, 1992, as related at the November 13, 1995 interview. The witness also noted that the alien is given an opportunity at the conclusion of the interview to add anything else. Respondent in this case made no mention of homosexuality at the interview. The witness was questioned about the Department of State profiles and the absence of any information regarding the problems of homosexuals in Guatemala. The witness acknowledged that he hasn't read much about the status of homosexuals in Guatemala, attributing that in part to the fact that he hasn't had a Guatemala homosexual case noting that if he did, he would review the available evidence on the matter. The witness also stated that he does not believe that there is much persecution of homosexuals in Guatemala as the issue homosexuality has not been raised to the level of seriousness as with other countries.

To be eligible for asylum under Section 208 of the Act an alien must meet the definition of a "refugee" which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. To be eligible for withholding of deportation an alien's facts must show a clear probability of persecution on the country designated for deportation on account of any one of five statutory

grounds. The alien bears the evidentiary burdens of proof and persuasion in any application for asylum under Section 208 of the Act and withholding of deportation. The Courts have concluded that the "well-founded fear" standard and the "clear probability" standard are different, that the former is more generous than the latter.

The Respondent has presented insufficient specific facts as well as concrete and/or credible evidence for the Court to infer that he has been persecuted or has a well-founded fear of persecution in Guatemala on account of his race, his religion, his nationality, his membership in a particular social group or his political opinion. The basis of the Respondent's claim to asylum before this Court was dramatically inconsistent with the claim presented to the INS in 1992 and reaffirmed before an INS asylum officer on November 13, 1995. Although Respondent provides an explanation for the different claims I do not find that explanation to be credible. In light of the Respondent's intelligence and more than three years time in the Los Angeles area during which time he appears to have freely associated with other gays and to have had no untoward difficulties with governmental authorities Respondent did not acquire the articulate intelligent relaxed demeanor which he exhibited in this Court overnight. Moreover, we have a situation where the Respondent did worse than neglect for whatever reason to refer to his "homosexual" claim in 1992 or 1995, he set forth "student/political" claim which was completely untrue and he knew it was untrue. The Respondent's prior experience does not entitle him to come to the United States and lie to a governmental official to secure benefits under the laws of this country. Based upon this conduct I find that Respondent's present claim

of mistreatment due to his homosexuality lacks credibility and, indeed, that Respondent is not a person of good moral character as that term is defined at Section 101(f)(6) of the Act.

Even assuming there is some truth to Respondent's present claims, Respondent has not presented sufficient evidence for the Court to conclude that he was persecuted or has a well-founded fear of persecution within the meaning of the Act. 8 C.F.R Section 208.13(b)(2)(i) states: "In evaluating whether the Applicant has sustained his burden of proving that he has a well-founded fear of persecution the asylum officer or Immigration Judge Shall not require the Applicant to provide evidence that he would be singled out individually for persecution if (A) he establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the Applicant on account of race, religion, nationality, membership in a particular social group or political opinion and (B) he establishes his own inclusion in an identification with such group or persons such that his fear of persecution upon return is reasonable." In this case Respondent has offered documentary and testimonial evidence regarding the treatment of homosexuals in Guatemala. While discrimination and persecution of homosexuals are illegal in Guatemala and homosexual conduct is not identified as a criminal offense in the law homosexuals are subject to official and police harassment and violence. See Exh. No. 5, Tabs F (relating to Heather McClure's recent trip to Guatemala) and H (a one or two page excerpt from "the third pink book global view of lesbian and gay liberation and oppression"). Although there is some social support for gay rights, homosexuality is viewed as a moral deficiency, abnormal

and unnatural (Exh. No. 5, Tab H). Miss McClure's testimony pertained to her observations and inquiries over a ten day trip to Guatemala, her sole trip to that country. Mr. Murray's testimony related to the treatment of homosexuals in Latin America including Guatemala which he last visited in 1988. After considering all the evidence presented I find that Respondent has presented insufficient evidence for the Court to conclude that there is a "pattern or practice" or indeed any organized systematic or pervasive, persecution of "homosexuals" or "relatively effeminate homosexuals" or "effeminate Guatemalan males" in Guatemala.

Again, even assuming for the sake of argument Respondent was mistreated in the manner described to the Court I am not persuaded that that mistreatment amounted to persecution within the meaning of the Act or that Respondent has otherwise established a well-founded fear of persecution within the meaning of the Act. Although Respondent claims that he was mistreated on various occasions by both airport and city police due to his homosexuality I am not persuaded that the Guatemalan government is unable or unwilling to take appropriate criminal or other disciplinary action against those individuals who commit acts of violence against those of its citizens who are homosexual. Respondent did not complain or report his problems with the police to anyone in a position of authority. Respondent has not established that the Guatemalan government, including leaders of the military or police instigated or sanctioned any mistreatment of the Respondent or homosexuals in general.

Respondent's claim relative to congressman and Mrs. Diaz arises from the fact that Respondent had an affair

with Mr. Diaz. Respondent has not presented sufficient evidence to establish that either the congressman with whom the Respondent has previously engaged in consensual sex or the congressman's wife who was clearly angered by this circumstance and her husband's sexual interest in Respondent have ever formed the intent to harm Respondent due to his status as a homosexual. While congressman Diaz allegedly later forced himself upon the Respondent his purpose was to satisfy his sexual desires. It was a criminal act. The congressman and Respondent had engaged in consensual sex on a number of previous occasions and after the Respondent upon learning of the congressman's marriage ended the relationship the congressman, who apparently wanted to continue to have sex with the Respondent forced himself upon the Respondent. Mr. Diaz does not appear to have been interested in changing any characteristic of the Respondent as much as to take advantage of a characteristic. While the Respondent claims that the bodyguards whom the congressman's wife directed to the Respondent made derisive reference to the fact that Respondent was homosexual there is no reason to believe that Mrs. Diaz would have had any interest in the Respondent apart from the fact that Respondent had slept with her husband. In the end Mrs. Diaz obtained her personal revenge.

Although Respondent attempts to portray this case as being about Guatemala's treatment of homosexuals and his status as a homosexual and, in fact, it is about infidelity and the domestic disruption caused by an affair between the Respondent who happens to be a homosexual and a married congressman who appears to be bisexual but for this conduct or affair between Respondent (a homosexual) and the congressman (a bisexual) there is

no reason to believe that Respondent would have had any difficulty with either congressman Diaz, Mrs. Diaz and the men whom Mrs. Diaz sent to beat up the Respondent.

The social groups to which Congress refers are those whose members share similar backgrounds, habits or social status. Although homosexuals can be such a group, "social groups" would not normally be considered to apply to persons whose only common characteristic is that they have transgressed the rules of conduct of a given society. The circumstances of this case do not establish status based persecution. Accordingly, Respondent's application for asylum is denied on statutory grounds.

The Court further finds that the Respondent has failed to establish that there is a clear probability that his life or freedom would be threatened in Guatemala on account of any of the statutory grounds under the withholding provision.

The Respondent has applied for the privilege of voluntary departure pursuant to Sections 244(e) of the Act as it existed prior to April 1, 1997. That section requires an alien to establish that he is a person of good moral character at least five years immediately preceding his application. Good moral character as a defined term in Section 101(f)(6) of the Act bars the finding of good moral character if the alien has given false testimony for the purpose of obtaining any benefit under the Act. In this case, Respondent is unable to establish statutory eligibility as he gave false testimony before an INS asylum officer on November 13, 1995 for the purpose of obtaining asylum in the United States pursuant to Section

208 of the Act. Accordingly, Respondent's application for voluntary departure is denied on statutory grounds.

ORDERS

IT IS ORDERED that the Respondent's application for asylum be and the same is hereby denied.

IT IS FURTHER ORDERED that Respondent's application for withholding of deportation be and the same is hereby denied.

IT IS FURTHER ORDERED the Respondent's application for voluntary departure be and the same is hereby denied.

It is further ordered THAT THE Respondent be deported from the United States to Guatemala on the charge contained in the Order to Show Cause.

WILLIAM MARTIN
Immigration Judge

CERTIFICATION PAGE

I hearby certify that the attached proceeding before JUDGE WILLIAM J. MARTIN, in the matter of:

SAUL GREGORIO MARTINEZ

A 70 217 803

LOS ANGELES, CALIFORNIA

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review

/s/ *DIANE L. MELLO*
Diane L. Mello, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902
August 24, 1997
(Completion of date)

By submission of this CERTIFIED PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

File No.: A 70 217 803

IN THE MATTER OF
SAUL GREGORIO MARTINEZ, RESPONDENT

Mar. 26, 1993

EXCERPT OF TRANSCRIPTS OF HEARING BEFORE THE IMMIGRATION JUDGE

* * * * *

[3]

MS. SKLAR TO JUDGE

Yes

JUDGE TO MS. SKLAR

How does he plead?

MS. SKLAR TO JUDGE

He admits the allegations, concedes deportability, declines to designate a country of deportation and would like to renew his application for asylum before this Court.

JUDGE TO MS. SKLAR

All right. The Court designates Guatemala as the country of deportation should deportation become necessary. And is he renewing the—well, the Court has a copy of a Request for Asylum in your client's name dated September 21, 1992. This application was sent to the Court by the Service along with the Order to Show Cause in your client's case. Does he wish to renew—pursue that application?

MS. SKLAR TO JUDGE

Not exactly. There's—that, that application—

JUDGE TO MS. SKLAR

Well, you said renew, that's the only one I've got.

MS. SKLAR TO JUDGE

I said renew an application for asylum. I know I—we, we, we don't want the case to be expedited but that pro—that application was filled out by a notary and it has problems. And I understand that if we file a new form, it turns into an [4] expedited case and we don't want that.

JUDGE TO MS. SKLAR

That's right.

MS. SKLAR TO JUDGE

Well, we'll set the record straight—

JUDGE TO MS. SKLAR

So what do you want to do?

MS. SKLAR TO JUDGE

—with a declaration

JUDGE TO MS. SKLAR

All right. All—

MS. SKLAR TO JUDGE

Because as long as you're not going to bind him—you know, hold him to that application just because it happens to be the one that was submitted we will submit a sworn declaration and provide testimony on the facts of the case and explain the reason that the ones in the application are not correct. They were—it wasn't filled out by a professional representative.

JUDGE TO MS. SKLAR

All right. You've indicated that the Respondent wishes to supplement that application with a declaration noting that matters that you referred to. Is that correct?

MS. SKLAR TO JUDGE

Yes, Your Honor

* * * * *

APPENDIX E

U.S. Department of Justice
Immigration and Naturalization Service
Order to Show Cause and Notice of Hearing

ORDER TO SHOW CAUSE AND NOTICE OF HEARING (ORDEN DE PRESENTAR MOTIVOS JUSTIFICANTES Y AVISO DE AUDIENCIA)

In Deportation Proceedings under section 242 of the Immigration and Nationality Act.

(En los procedimientos de deportación a tenor de la sección 242 de la Lay de Inmigración y Nacionalidad.)

United States of America:
(Estados Unidos de América:)

File No. ***70 217 803***
(No. De registro)

Dated ***[Nov. 17, 1995]***
(Fechada)

In the matter of
(En el asunto de)

MARTINEZ, SAUL GREGORIO
(Respondent) (Demandado)

Address
(Dirección)

2354 LAVERNA AVE.
EAGLE ROCK, CA 90041-0000

Telephone No. (Area Code) 213-484-0897
(Num. De telèfono y código de àrea)

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

(Según las indagaciones realizadas por el Servicio de Inmigración y Naturalización, se alega que:)

1) You are not a citizen or national of the United States.
(Ud. No es ciudadano o nacional de los Estados Unidos);

2) You are a native of GUATEMALA and a citizen of GUATEMALA;
(Ud. es nativo de) (y ciudadano de)

3) You entered the United States at or near SAN YSIDRO, CA on or about May 14, 1992;
(Ud. entró a los Estados Unidos en o cerca de SAN YSIDRO, CA el día o hacia esa fecha 14 de Mayo 1992;)

4) You were not then inspected by an immigration officer.
(Ud. no fue inspeccionado entonces por un funcionario de inmigración)

NOTICE OF RIGHTS AND CONSEQUENCES

The Immigration and Naturalization Service believes that you are an alien not lawfully entitled to be in or to remain in the United States. Read this notice carefully and ask questions about anything in this notice you do not understand. This notice identifies your rights as an alien in deportation proceedings, and your obligations and the conditions with which you must comply in order to protect your eligibility to be considered for certain benefits.

AVISO DE DERECHOS Y CONSECENCIAS

El Servicio de inmigracion y Naturalizacion opina que Ud. es un extranjero sin derecho legal a estar o permanecer en los Estado Unidos. Lea este aviso cuidadosamente y pregunte acerca de cualquier parte del mismo que no entienda. Este aviso le explica los derechos que tiene como extranjero en los tramites de deportacion, y las obligaciones y condiciones que debe cumplir con el fin de proteger su derecho a que se le considere para recibir ciertos beneficios.

Any statement you make before an Immigration Officer may be used against you in any immigration or administrative proceeding.

Las declaraciones que haga ante un funcionario del Servicio de Inmigracion podran usarse en su contra en cualquier tramite administrativo o de inmigracion.

You may be represented, at no expense to the United States government, by an attorney or other individual who is authorized and qualified to represent persons in these proceedings. You will be given a list of organizations, attorneys and other persons who have indicated their availability to represent aliens in these proceedings. Some of these persons may represent you free of charge or for a nominal fee. You may also be represented by a friend, relative, or other person having a pre-existing relationship with you, provided his or her appearance is permitted by the immigration judge.

Ud. puede ser representado, sin costo alguno para el gobierno de los Estado Unidos, por un abogado o otra persona autorizada y calificada para representar personas en estos tramites. Ud. recibira una lista de las entidades, abogados y demas personas dispuestas a representar a extranjeros en estos tramites. Algunas de esas personas pueden representarle gratuitamente o por honorarios nominales. Tambien puede representarle un amigo, familiar o otra persona con la que tenga una relacion establecida, siempre que el juez de

inmigracion permita su comparecencia.

You will have a hearing before an immigration judge, scheduled no sooner than 14 days from the date you are served with this Order to Show Cause (unless you request in writing an earlier hearing date). The fourteen-day period is to allow you to seek an attorney or representative, if you desire to be represented. At your hearing, you will be given the opportunity to admit or deny any or all of the allegations in this Order to Show Cause, and whether you are deportable on the charges set forth herein. You will have an opportunity to present evidence and/or witnesses on your own behalf, to examine evidence presented by the government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the government. Any docu-

Ud. tendra una audiencia ante un juez de inmigracion, fijada con un minimo de 14 dias a partir de la fecha que se le expidio esta Orden (a menos que Ud. solicite por escrito una audiencia en plazo aun menor). El plazo de catorce dias le permitira conseguir los servicios de un abogado o representante, si lo desea. En la audiencia se le dara la oportunidad de admitir o negar cualquiera de los alegatos de esta Orden o todos ellos, y se le informara si esta sujeto a deportacion por los cargos expresados en la misma. Ud. tendra la oportunidad de presentar pruebas y testigos a favor suyo, de examinar las pruebas presentadas por el gobierno, de oponerse, con base en los razonamientos legales pertinentes, a la admision de pruebas y de inter-

ment that you present that is in a foreign language must be accompanied by a certified English translation. It is your responsibility to ensure that any witnesses you wish to present on your own behalf be present at the hearing.

rogar a cualquier testigo del goviemo. Todo documento que presente en un idioma extranjero debe ir acompanado de una traduccion certifieada al ingles. Sera responsabilidad suya asegurarse de que cualquier testigo suyo comparesca a la audiencia.

The immigration judge will advise you regarding relief from deportation for which you may be eligible. You will be given a reasonable opportunity to make an application for any such relief. If you are not satisfied with the decision of the immigration judge, you have the right to appeal. The immigration judge will provide you with your appeal rights.

El juez de inmigracion le informara sobre los recursos de deportacion a los que tenga derecho y se le dara una oportunidad adecuada para solicitarlos. Si no esta de acuerdo con la decision del juez, puede apelarla. E1 juez de inmigracion le informara acerca de sus derechos de apelacion.

U.S. Department of Justice
Immigration and Naturalization Service
Order to Show Cause and Notice of Hearing

Continuation Sheet
(Hoja complementaria)

Dated [Nov. 17, 1995]
(Fechada)

Respondent MARTINEZ, SAUL GREGORIO
(Demandado)

File No. 70 217 803
(No. de registro)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

(**Y** según los alegatos anteriores, se le acusa de estar sujeto a deportación de acuerdo con la(s) siguiente(s) disposicion(es) de la ley:)

Section 241(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that you entered the United States without inspection.

(Sección 241(a)(1)(B) de la Ley de Inmigración y Nacionalidad (INA), según enmendada, en que Ud. entró los Estados Unidos sin inspección)

WHEREFORE, YOU ARE ORDERED to appear for a hearing before an Immigration Judge of the Executive Office for Immigration Review of the United States Department of Justice at:

(**POR LO CUAL, SE LE ORDENA** comparecer ante un juez de inmigración de la Oficina Ejecutiva de Revisión de Inmigración del Departmento de Justicia de los Estados Unidos en:)

300 N LOS ANGELES ST ROOM 2001
Address LOS ANGELES, CA 90012-0000
(Dirección)

On [Mar. 26, 1996] At [8:30 a.m.]
(Fecha) (Hora)

and show cause why you should not be deported from the United States on the charge(s) set forth above.

(y mostrar motivos justificantes por cual no debería ser deportado de los Estados Unidos por los cargos expresados anteriormente.)

Dated [Nov. 17, 1995]
(Fechada)

Signature of Issuing Officer /s/ ILLEGIBLE
(Firma del funcionario que la expide)

City and State of Issuance ANAHEIM, CA
(Ciudad y Estado donde se expide)

Title of Issuing Officer Supervisory Asylum Officer
(Título del funcionario que la expide)

You are required to be present at your deportation hearing prepared to proceed. If you fail to appear at any hearing after having been given written notice of the date, time and location of your hearing, you will be ordered deported in your absence, if it is established that you are deportable and you have been provided the appropriate notice of the hearing

Esta obligado a asistir a la audiencis deportacion y de estar preparado para ella. Si no asiste a cualquiera de las audiencias despues de haber sido notificado por escrito de la fecha, hora y lugar de la audiencia, se ordenara su deportacion en su ausencia, si se establece que puede ser deportado y que recibio los avisos correspondientes.

You are required by law to provide immediately in writing an address (and telephone number, if any) where you can be contacted. You are required to provide written notice, within five (5) days, of any change in your address or telephone number to the office of the Immigration Judge listed in this notice. Any notices will be mailed only to the last address pro-

La ley le obliga a informar inmediateamente por escrito de su domicilio (y numero de telefono, de haberlo) donde pueda ser localizado. Tiene la obligacion de notificar por escrito, en el plazo de cinco (5) dias, cualquier cambio de domicilio o de telefono a la oficina del juez de inmigracion qu aparece en este aviso. Los avisos se enviaran solamente a

vided by you. If you are represented, notice will be sent to your representative. If you fail to appear at the scheduled deportation hearing, you will be ordered deported in your absence if it is established that you are deportable and you have been provided the appropriate notice of the hearing.

la ultima direccion facilitada por Ud. Si ha decidido tener un representante, se enviaran los avisos a dicha persona. Si no asiste a cualquiera de las audiencias despues de haber sido notificado por escrito de la fecha, hora y lugar de las mismas, se ordenara su deportacion en su ausencia, si se establece que puede ser deportado y que recibio el aviso de la audiencia.

If you are ordered deported in your absence, you cannot seek to have that order rescinded except that: (a) you may file a motion to reopen the hearing within 180 days after the date of the order if you are able to show that your failure to appear was because of exceptional circumstances, or (b) you may file a motion to reopen at any time after the date of the order if you can show that you did not receive written notice of your hearing

Si se ordena su deportacion en su ausencia, no podra solicitor la anulacion de esa orden salvo que: (a) pueda presentar un pedimento para tener otra audiencia en el plazo de 180 dias despues de la fecha de la orden si puede demostrar quo no comparecio debido a circumstancias excepcionales, o (b) puede presentar un pedimento para tener otra audiencia en cualquier momento despues de la fecha de la orden si puede demonstrar que no

and you had provided your address and telephone number (or any changes of your address or telephone number) as required, or that you were incarcerated and did not appear at your hearing through no fault of your own. If you choose to seek judicial review of a deportation order entered in your absence, you must file the petition for review within 60 days (30 days if you are convicted of an aggravated felony) after the date of the final order, and the review shall be confined to the issues of validity of the notice provided to you, the reasons for your failure to appear at your hearing, and whether the government established that you are deportable.

recibio el aviso de la audiencia por escrito y que habia facilitado su direccion y numero de telefono (o notificado los cambios de direccion o numero de telefono) segun lo previsto, o que estaba encarcelado y no comparecio a la audiencia por motivos ajenos a su voluntad. Si decide solicitar una revision judicial de la orden de deportacion en su ausencia, debe presentar la solicitud de revision en el plazo de 60 dias (30 dias si ha sido condenado por un delito grave con agravantes) a partir de la fecha de la orden definitiva, y la revision se limitara a decidir si el aviso que recibio es valido, las razones por las cuales no comparecio a la audiencia y si el gobierno demostro que puede ser deportado.

In addition to the above, if you are ordered deported in your absence,

Ademas de lo anterior, si se ordena su deportacion en su ausencia, no podra,

you are ineligible for five (5) years from the date of the final order for the following relief from deportation: voluntary departure under section 242(b) of the Immigration and Nationality Act (INA); suspension of deportation or voluntary departure under section 244 of the INA; and adjustment of status under sections 245, 248, and 249 of the INA.

en el plazo de cinco anos despues de la fecha de la orden definitiva, tener derecho a los siguientes recursos: salida voluntaria segun la seccion 242(b) de la ley de Inmigracion y Nacionalidad (INA); suspension de la deportacion o de la salida voluntaria segun la seccion 244 de la INA, y ajuste de condicion segun las secciones 245, 248, y 249 de la INA.

The copy of this Order to Show Cause served upon you is evidence of your alien registration while you are under deportation proceedings. The law requires that you carry it with you at all times.

Esta copia de la Orden de Presentar Motivos Justificantes que le ha sido notificada constituye la prueba de su registro de extranjero mientras se llevan a cabo los tramites para su deportacion. La ley le exige que la lleve consign en todo momento.

Form I-221 (Rev. 6/12/92) N

This Order to Show Cause shall be filed with the Immigration Judge of the Executive Office for Immigration Review at the address provided below. You must report any changes of your address or telephone number in writing to this office:

Debe presentar [illegible] Orden de presentar Motivos Justificantes a la Oficina Ejecutiva de Revisión. Debe notificar cualquier cambio [illegible] su domicilio o número de teléfono por escrito a:

The Office of the Immigration Judge
300 N LOS ANGELES ST ROOM 2001
LOS ANGELES, CA 90012-0000

Certificate of Translation and Oral Notice

This Order to Show Cause ☐ **was** ☒ **was not** read to the named alien in the SPANISH language, which is his/her native language, which he/she understands.

Date Signature Printed Name and Title of Translator

Address of Translator (if other than INS employee) or office location and division (if INS employee)

(If oral notice was not provided please explain)

Manner of Service	Alien's Right Thumb Print
☒ Personal Service to Alien ☐ Certified Mail—Return Receipt Requested ☐ Alien ☐ Counsel of Record	

Certificate of Service

This Order to Show Cause was served by me at ANAHEIM, CA on [Nov. 21, 1995] at [2:30 p.]m.

/s/ ILLEGIBLE — ANABELLE ROJAS
Officer's signature — Printed Name

Investigative Asst. -ZLA
Title — Office

/s/ ILLEGIBLE
Alien's Signature (acknowledgment/receipt of this form)
(firma de extranjero/acuse de recibo)

Request for Prompt Hearing and Waiver of 14-Day Minimum Period
(Solicitud de audiencia inmediata y renuncia al plazo minimo de 14 dias)

To expedite determination of my case, I request an immediate hearing, and waive my right to the 14 day notice.

(Para agilizar la decisión sobre mi caso, solicito una audiencia inmediata y renuncio a mi derecho a un plazo mínimo de 14 dias.)

Signature of Respondent (Firma del Demandado)	Date (Fecha)

(3)

No. 09-665

Court, U.S.
S D
FEB 2 5 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAUL GREGORIO MARTINEZ,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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THIS IS NOT A DISPUTE RELATING TO FACTS; THE FACTS OF THIS CASE ARE STRAIGHTFORWARD AND SETTLED, BUT THE LAW IS NOT.

Contrary to Respondent's assertion, this is not a "fact-intensive" case. O11.[1] Respondent does not identify any factual inquiry that this Court needs to make, and none exists. Rather, this case comes to the Court with undisputed facts applied to uncertain laws affecting thousands of people nationwide.

Respondent's Opposition demonstrates that no material facts are in dispute. Martinez admits that his initial asylum application was false. P2-3. Martinez asserts, and Respondent's Opposition does not dispute, that: Martinez was persecuted in Guatemala because of his sexual orientation, P2; Martinez fears for his safety and life if returned to Guatemala, P2-6; Martinez's operative asylum claim under review by the Ninth Circuit was based on persecution for sexual orientation, P5-6; the Government did not oppose Martinez's motion under the Convention Against Torture ("CAT"), 8 C.F.R. § 208.16(c)(2), P5, P16; there is no evidence in the record contrary to Martinez's evidence in support of his CAT claim, P16; and neither the Board of Immigration Appeals ("BIA") nor the

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[1] Citations to the Petition for Writ of Certiorari will be styled, "P___", citations to Respondent's Brief in Opposition will be styled, "O___", citations to Petitioner's Appendix will be styled "PA___", and citations to Respondent's Appendix will be styled, "RA___".

Ninth Circuit offered any substantive explanation for denying Martinez's CAT claim, P16, PA14, PA20-21.[2]

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[2] Respondent emphasizes an important fact that reinforces Martinez's position: Martinez announced his intention to modify his asylum application at his first removal hearing *before* the law clearly recognized persecution for sexual orientation as a basis for seeking asylum. *See* O6, RA32a-33a. Respondent concedes that Martinez announced at the "*first session* of his removal hearing" on March 26, 1996 that he would be filing a new sworn declaration with different reasons for seeking asylum. O6 (emphasis added). On April 4, 1996, the Immigration and Naturalization Service ("INS") "formally" and firmly recognized for the first time that sexual orientation could serve as a basis for seeking asylum, rather than as a potential basis for deportation. *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005). In a footnote, Respondent states that Judge Pregerson's dissent on this point is "not complete," O10 n.3, but Respondent cites no authority to support its contention that "precedent" made it clear that sexual orientation could serve as a basis for asylum before April 4, 1996. Respondent ignores the Ninth Circuit's holding in *Karouni* that the INS's formal shift in treatment of homosexuals first occurred on April 4, 1996. Martinez admitted that his first asylum application was false, and modified his asylum application on April 23, 1996. PA16.

RESPONDENT'S OPPOSITION REAFFIRMS THAT CIRCUIT SPLITS EXIST ON IMPORTANT ISSUES OF LAW.

The Concessions And Omissions In Respondent's Opposition Demonstrate That, In Pre-REAL ID Act Cases, Some Circuit Court Decisions Look "Only" To Inconsistencies That Go To The "Heart" Of An Asylum Claim And Some, Like The Decision At Issue In This Case, Do Not.

Respondent concedes that "a number of circuits . . . have held that inconsistencies, inaccuracies or omissions can be the basis for adverse credibility findings ***only*** if they are material and go to the 'heart' of a petitioner's claim." O4 (emphasis added). Martinez agrees that a "number of circuits," most in fact, adopt this rule for cases commenced before the effective date of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 303 (2005) ("REAL ID Act") (asylum standard codified at 8 U.S.C. § 1158(b)(1)(B)(iii)). P8-10. Respondent addresses several circuit decisions that *reinforce* the prevalent general rule. O11-12 n.4; *see also* P9-10 n.4. But, Respondent fails to address numerous circuit court decisions cited by Martinez that contribute to the split in authority by ***not*** adhering to this rule. P11-12 (citing, *e.g.*, *Siewe v.*

Gonzales, 480 F.3d 160, 170 (2d Cir. 2007) and *Yongo v. I.N.S.*, 355 F.3d 27, 33-34 (1st Cir. 2004)).[3]

The Ninth Circuit's decision in the present case also does not adhere to the prevalent rule even though it summarily claims to do so in language seized on by Respondent. *See* PA13, O10. Although the Ninth Circuit majority asserts that it "goes without saying" that Martinez's false statements went to the heart of Martinez's claim, it is clear from reading the opinion that the court actually was referring only to Martinez's admittedly false *initial* application and not to his *operative* application which was based on persecution for his sexual orientation. PA13.[4]

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[3] Contrary to Respondent's contention, O4, the First Circuit's decision in *Toure v. Ashcroft*, 400 F.3d 44 (1st Cir. 2005), does not adhere to the prevalent rule. In *Toure*, an asylum applicant was found not to be credible because she was unable to explain inconsistencies in her testimony in support of her *husband's* previously adjudicated asylum claim before a *different* immigration judge. *Id.* at 47-48. The First Circuit held that the inconsistencies went "to the heart" of the applicant's "credibility," but did not hold that they went to heart of the applicant's (*i.e.*, the wife's) pending *claim*. *Id.* at 48.

[4] Respondent appends the Ninth Circuit's July 25, 2003 decision that rejected the BIA's *de novo* adverse credibility determination denying Martinez's claim for asylum for fear of persecution based on his sexual orientation because "[t]he BIA provided no 'specific cogent reasons'" for rejecting that claim. RA2a. Like the Ninth Circuit's 2009 decision at issue, the Ninth Circuit's 2003 decision was decided over a dissenting opinion. Thus, this case alone has generated two split decisions from two different panels of the Ninth Circuit based on the same set of facts.

Here, nothing so vital to the outcome can "go without saying."

Respondent fails to explain how courts on the other side of the split – *i.e.*, those that properly apply the prevalent rule – could come to the same conclusion that the Ninth Circuit did here. For example, Respondent attempts, but fails, to distinguish the Third Circuit's decision in *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004). O11-12 n.4. In *Guo*, the Third Circuit recognized that there was a fundamental difference between an asylum claim based on religious persecution (which was found not to be credible) and a later claim based on a fear of forced sterilization, and held that "[t]he legitimacy of an initial credibility determination does not . . . justify denial of all subsequent applications for asylum." *Id.* at 562. Given the undisputed facts of this case, the Third Circuit would have come to a different conclusion than the Ninth Circuit, and would have ruled in Martinez's favor because his prior false statements did not go to the heart of his subsequent, *operative* asylum claim.

Respondent Does Not Dispute That There Is A Split In The Circuits On The Proper Approach To Claims Under The Convention Against Torture.

Respondent challenges Martinez's interpretation of the Ninth Circuit's decision with respect to his CAT claim, O14, but does not dispute that the Eighth Circuit stands in conflict with the Second, Third,

Sixth and Seventh Circuits as to whether an adverse credibility determination may be imported to dispose of a CAT claim, P15-19. Thus, it is undisputed that a split exists. The only issue is whether this case invokes the split. It does.

Respondent Fails To Defend The Ninth Circuit's Cursory Nod To Martinez's Claim Under The Convention Against Torture.

Like Respondent's Opposition, the Ninth Circuit's and BIA's decisions focus their opinions and emphases on the adverse credibility determination. O6-9, PA2-14, PA19-20. That determination suffuses every aspect of those rulings as well as Respondent's Opposition. Given the extensive weight placed on the adverse credibility determination, there is no reason to believe that the Ninth Circuit simply ignored the issue in its brief ruling on the CAT claim. PA14 n.1.

Respondent's suggestion that there "might have" been "some other reason" for rejecting Martinez's CAT claim is pure conjecture, and is not supported by the Ninth Circuit's decision or the law. O14. Unlike in civil and criminal cases, circuit court review of agency determinations, including those of the BIA, is limited to the rationales offered by the agencies involved. *See Ramirez-Altamirano v. Holder*, 563 F.2d 800, 804 (9th Cir. 2009). "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, *must judge the propriety of such action solely by the grounds invoked*

by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative decision by substituting what it considers to be a more adequate or proper basis." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis added).

Two crucial characteristics of the decisions by the BIA and the Ninth Circuit are undisputed: neither offers any substantive explanation for rejecting Martinez's CAT claim; and the *only* evidence on the CAT issue favored Martinez. P16, PA14, PA20-21. The Ninth Circuit's published decision in *Martinez* – like published decisions from the Eighth Circuit – sets precedent that vituperative adverse credibility determinations (or, worse yet, no substantive rationale at all) provide sufficient grounds to deny a CAT claim. P19. That result cannot be squared with decisions from the Second, Third, Sixth and Seventh Circuits, which correctly hold that CAT claims must be evaluated independently from adverse credibility determinations. P17-19.

RESPONDENT'S OPPOSITION REINFORCES THAT CERTIORARI IS TIMELY AND NECESSARY TO CLARIFY IMPORTANT ISSUES OF LAW IMPACTING THOUSANDS OF PEOPLE AND A HUGE PROPORTION OF THE CIRCUIT COURTS' DOCKETS.

Respondent does not disagree that thousands of pre-REAL ID Act cases involving adverse credibility determinations are still working their way through

the lower courts every year, and that appeals from the BIA represent thirty-five to forty percent of the dockets of the Second and Ninth Circuits. P13-14. The Opposition notes that the number of pre-REAL ID Act cases is "necessarily declining." O13. Respondent cites, however, to a new decision from the Ninth Circuit, *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010), that reinforces how relatively unusual post-REAL ID Act cases remain at the appellate court level: "The Ninth Circuit has only recently begun to apply the [REAL ID Act] to adverse credibility determinations." Pre-REAL ID Act cases, and the proper analysis of adverse credibility determinations, likely compose a larger percentage of appeals in the circuit courts than *any other kind of case*, and will continue to do so for the foreseeable future. P13-14.[5]

Respondent also does not dispute that the danger of confusing adverse credibility determinations with CAT claims will *increase* with the passage of the REAL ID Act because judges in post-REAL ID Act cases have more discretion to make adverse credibility

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[5] *See* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf (statistics showing that the largest percentage of cases in the Second and Ninth Circuits comes from the BIA, and that over 15% of cases in all circuit courts combined come from the BIA); and Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Texas Int'l L. J. 185, 187 (Winter 2008) (noting, with citations, that "[a] substantial percentage of . . . immigration cases concerns asylum, and credibility determinations are the most challenged aspect of asylum claims").

determinations. P20-21. Delay in clarifying the proper relationship, if any, between adverse credibility determinations and CAT claims will adversely affect great numbers of cases and promote uncertainty in the law.

CONCLUSION

Without this Court's guidance, immigration judges, the BIA and circuit courts across the country will not have a clear understanding of whether a false statement in a pre-REAL ID Act case must actually go to the heart of an applicant's operative application. Nor will they have an understanding of whether or when adverse credibility determinations regarding asylum claims may be applied to dispose of a CAT claim. Given the massive numbers of immigration cases weighing down dockets on these issues, it is critical that the questions presented be answered.

Respectfully submitted,

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